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No. _____

IN THE

Supreme Court of the United States

October Term, 1983

JOHN R. BALELO, et al.,

Petitioners,

v.

MALCOLM BALDRIGE, Secretary of Commerce of the United States, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, consistently with the Fourth Amendment, an administrative agency may, without a warrant, without probable cause or reasonable suspicion, and without express statutory authority, station government surveillance agents aboard fishing vessels for three months to gather incriminating evidence to be used in criminal and civil prosecutions against vessel and crew.

2. Whether the enforcement provision of the Marine Mammal Protection Act, authorizing a warrantless search of a vessel only if there is reasonable cause to believe a violation exists, prohibits the stationing of government surveillance agents aboard fishing vessels without such reasonable cause.

LIST OF PARTIES

1. Petitioners are the plaintiffs below, John R. Balelo, Andrew Castagnola, Leo Correia, Manuel D. Jorge, Bryan D. Madruga, Harold Medina, John A. Silva, Ralph F. Silva, Jr., George Sousa, Manuel S. Vargas, Jr., John B. Zolezzi, Jr.

2. Respondents are the defendants below, Malcolm Baldrige, Secretary of Commerce of the United States, Richard A. Frank, Administrator, National Oceanographic and Atmospheric Administration (NOAA) and Terry Leitzell, Assistant Administrator for Fisheries, National Marine Fisheries Service (NMFS). Additional Respondents are Intervenor-Defendants below, Environmental Defense Fund, Inc. and Defenders of Wildlife.

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The petitioners, John R. Balelo, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion *en banc* of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 24, 1984.

OPINIONS BELOW

The opinions of the Court of Appeals *en banc* are reported at 724 F.2d 753, and appear in Appendix A hereto.

(The majority opinion commences at p. 1a; Judge Pregerson's concurring opinion at p. 21a; Judge Nelson's concurring opinion at p. 22a; Judge Tang's dissenting opinion at p. 23a; and Judge Ferguson's dissenting opinion at p. 31a.)

The opinions of the original three-judge panel of the Court of Appeals, not reported, appear in Appendix B hereto.

(The majority opinion commences at p. 36a; Judge Goodwin's dissenting opinion at p. 45a.)

The opinion of the District Court for the Southern District of California is reported at 519 F.Supp. 573, and appears in Appendix C hereto (commencing at p. 48a).

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit *en banc* was filed on January 24, 1984, and appears in Appendix D hereto. (Pet. App. 59a.) This Court's jurisdiction is invoked uner 28 U.S.C. § 1254(1).

PROVISIONS OF CONSTITUTION, STATUTE AND REGULATION INVOLVED

1. United States Constitution, Fourth Amendment (set forth in Appendix E, p. 60a).

2. United States Code, Title 16 § 1377 and § 1381 (set forth in Appendix E, pp. 60a, 62a).

3. Code of Federal Regulations, Title 50 § 216.24(f) (set forth in Appendix E, p. 64a).

The pertinent portion is as follows:

> "(f) *Observers* (1) The vessel certificate holder of any vessel certified shall, upon the proper notification by the National Marine Fisheries Service, allow an observer duly authorized by the Secretary to accompany the vessel on any and all regular fishing trips for the purpose of conducting research and observing operations, including collecting information which may be used in civil or criminal penalty proceedings, forfeiture actions, or permit or certificate sanctions."

STATEMENT OF THE CASE[1]

Background

Petitioners, eleven tunaboat captains, brought an action for declaratory and injunctive relief in the district court seeking to invalidate a regulation promulgated by the Secretary of Commerce under the Marine Mammal Protection Act (MMPA), 16 U.S.C. § 1361, *et seq.* Jurisdiction of the district court was predicated upon 28 U.S.C. § 1331 and §§ 2201-2.

Under the regulation, tuna purse-seine fishing vessels were required, as a condition of a permit to fish, to carry onboard government surveillance agents for the 90-day duration of a voyage, to observe operations and gather evidence to be used against vessel and crew in criminal prosecutions and civil penalty and forfeiture proceedings. The district court granted an injunction prohibiting any but scientific use of the data gathered by the agents. A three-judge panel of the Ninth Circuit affirmed and remanded to the district court to expand the injunction to preclude the placement of agents on the vessels for any purpose without a warrant. A divided *en banc* court (not including any of the original panel members) reversed.

The regulation deals with a method of fishing for tuna utilizing porpoise as a means of locating the fish. For reasons not yet fully understood, yellowfin tuna tend to swim in association with schools of porpoise in areas of the eastern tropical Pacific Ocean. (J.E.R. 497.) Capitalizing on this affinity, tunaboats often encircle a school of porpoise with a large net (seine), which is then drawn closed at the bottom (pursed), capturing the tuna. Most porpoise are freed through a special maneuver, but in the process porpoise are sometimes injured or killed. (J.E.R. 497.)

The fishermen have developed special gear, techniques and maneuvers to minimize such unintended injury to porpoise, and over the past

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[1] Except for footnote material, the factual assertions in the following statement of the case are based upon an Agreed Statement of Facts filed by the parties in the district court which is included in the Joint Excerpt of Record (J.E.R.) filed in the court below.

decade porpoise mortality has declined from an estimated 300,000 per year to under 8,900 in 1983.[2] (J.E.R. 497.)

The Statute

In 1972 Congress enacted the Marine Mammal Protection Act, 16 U.S.C. § 1361, *et seq*. The Act imposed a moratorium on the taking and importation of marine mammals. 16 U.S.C. § 1371(a). A two-year exemption from the moratorium was granted for the taking of marine mammals incidental to commercial fishing operations. 16 U.S.C. § 1371(a)(2). During the two-year exemption, a research and development program was to be conducted to further improve fishing gear and techniques. 16 U.S.C. § 1381(a).

After the two-year exemption, incidental taking of porpoise was allowed under permits to be issued by the Secretary of Commerce subject to regulations which the Secretary was empowered to adopt. 16 U.S.C. § 1371(a)(2) and § 1373.

As enacted, the MMPA included a limited non-enforcement observer program. 16 U.S.C. § 1381(d) provided for the placement of federal observers aboard tuna vessels on a space-available basis for the purpose of conducting research and observing operations in regard to the development of improved fishing methods and gear. This statutory authorization and the research program expired by their own terms on October 21, 1974. 16 U.S.C. § 1381(a), (d). The government does not claim this expired section of the Act as expressly authorizing the current observer regulation. (J.E.R. 499.)

Section 1377 of the Act is entitled "Enforcement" and authorizes the Secretary to utilize federal and state officers to enforce the MMPA. Subsection (d) is captioned "Execution of Process; Arrest; Search; Seizure" and provides in pertinent part:

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[2] NMFS Porpoise Mortality Status Report No. 83-20, dated January 30, 1984. The annual mortality quota for the U.S. fleet is 20,500 for each of the years 1981-1985. 50 C.F.R. § 216.24 (table). According to government estimates published in 1980, the porpoise population of the eastern tropical Pacific was 7.4 million as of 1979, increasing at an annual rate of 4% compounded, or in excess of 300,000 porpoise a year. 45 F.R. 72179, 72184-5.

> "(d) . . . such person so authorized may, in addition to any other authority conferred by law -
>
> . . .
>
> (2) with a warrant or other process, or *without a warrant if he has reasonable cause to believe that a vessel* or other conveyance subject to the jurisdiction of the United States *or any person on board is in violation of any provision of this subchapter or the regulations* issued thereunder, *search such vessel* or conveyance and arrest such person;" [Emphasis added.]

Individual violations of the Act or regulations are punishable by a civil penalty of not to exceed $10,000 for each violation. Willful violations may result in criminal penalties of one year imprisonment and a $20,000 fine. Vessels may also have their cargo seized and forfeited, and the vessel is subject to a civil penalty of $25,000. 16 U.S.C. §§ 1375, 1376. The Secretary may pay informers up to $2,500 for information leading to conviction. 16 U.S.C. § 1376(c).

The Regulation

Pursuant to Section 1373, the Secretary in 1974 promulgated extensive regulations governing the taking of marine mammals. (J.E.R. 498.) In 1974 and in every year thereafter the Secretary has issued a general permit to the American Tunaboat Association. (J.E.R. 498.)[1] Individual purse-seine vessels wishing to fish "on porpoise" obtain a "certificate of inclusion" under the general permit. All plaintiffs are holders of a certificate of inclusion. (J.E.R. 498.)

The regulations issued by the Secretary, 50 C.F.R. § 216.24, cover nearly all facets of fishing for tuna on porpoise, from required

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[1] The American Tunaboat Association is an association of tunaboat owners which is headquartered in San Diego, California, and is the only holder of a Category 2 General Permit, which authorizes tuna purse-seine fishing involving the intentional encircling of marine mammals. 50 C.F.R. § 216.24(b)(1)(ii). The permit issued to the ATA is for the area commonly referred to as the eastern tropical Pacific Ocean, extending from 40 degrees North latitude to 40 degrees South latitude and from 160 degrees West longitude to the coast of North, Central and South America.

maneuvers and net construction down to the minutiae of the number of face masks and scuba tanks to be available for porpoise rescue operations.[4]

The regulation in issue is 50 C.F.R. § 216.24(f), effective January 1, 1981, which provides in pertinent part:

> "(f) *Observers* (1) The vessel certificate holder of any vessel certified shall, upon the proper notification by the National Marine Fisheries Service, allow an observer duly authorized by the Secretary to accompany the vessel on any and all regular fishing trips for the purpose of conducting research and observing operations, *including collecting information which may be used in civil or criminal penalty proceedings, forfeiture actions, or permit or certificate sanctions.*" [The italicized portion of the regulation is language which did not appear in any previous version of the regulation. (J.E.R. 501.)]

Pursuant to this regulation, the Secretary assigned federal surveillance agents, denominated "biological technicians", to approximately one-third of all trips made annually by purse-seiners holding certificates of inclusion. (J.E.R. 499-501.) Prior to the district court injunction in this case, the data gathered by observers was reviewed by the enforcement branch of NOAA, which then issued notices of violation to captains and owners of vessels deemed to have violated the porpoise regulations, and assessed penalties against them. (J.E.R. 500.)

The agents live aboard the vessel for the duration of a fishing voyage, often lasting 90 days. (J.E.R. 500.) They take their meals with the fishermen and bunk in crew's quarters (at government expense). (J.E.R. 499.) They are not confined to any particular areas of the vessel, although fishing operations are to be observed from on deck. (J.E.R. 500.) They have access to the pilothouse to obtain position data and the radio room for transmission of messages.

The NMFS issues a Field Manual and associated logs and record forms for use by the agents. (J.E.R. 502.) The Manual directs agents, *inter*

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[4] Fishermen are required by the regulations to manually aid with the release of porpoise trapped in the net from a rubber life raft. 50 C.F.R. § 216.24(d)(2)(vii). There have been cases of death and severe injury from sharks during this rescue operation.

alia, to perform the following functions: (a) record observations pertaining to the United States Marine Mammal Regulations; (b) maintain open communication with the vessel operator and other vessel personnel; (c) obtain several crew estimates of the size and species composition of porpoise schools before a set is commenced and after capture; (d) obtain the captain's estimate of the size and species composition of porpoise schools after the net is let go and after capture; (e) obtain the captain's comments regarding each set and his justification for failure to observe a required procedure, as well as any disagreement with the recorded observations of the observer; (f) make and record a physical count of dead or injured porpoise during capture and after the net is brought aboard the vessel; (g) require the crew to retrieve dead mammals and retain them aboard in cold storage as specimens. (J.E.R. 502.)

Observed trips are scheduled well in advance. NMFS advises a vessel of a prospective agent placement by certified letter. The vessel is required to give at least five days notice prior to departure in order to facilitate agent placement. 50 C.F.R. § 216.24(f)(4).[5]

No warrants are sought by NMFS for the placement of the agents. (J.E.R. 501.) When the agent boards the vessel and departs port, neither he nor the NMFS has reasonable cause to believe the vessel or any person on board is in violation of the MMPA or regulations as described in Section 1377. (J.E.R. 499-501.)

The Decisions Below

The district court determined that the surveillance regulation promulgated by the Secretary was not authorized under the MMPA and was in direct conflict with the search and seizure standard set forth in Section 1377 of the Act, in that it was a warrantless search without reasonable cause; further, that the placement of agents on fishing vessels without warrant was a search in violation of the Fourth Amendment, and did not come within the pervasively regulated industry exception to the warrant requirement. The court enjoined the use of observer-gathered data for other than scientific purposes. (Pet. App. pp. 48a-58a.)

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[5] In addition, a predeparture conference is held between the agent and a representative of the agency and the captain and owner of the vessel.

The original three-judge panel of the Ninth Circuit, one judge dissenting, affirmed the judgment, but remanded the case to the district court to expand the injunction to prohibit placement of agents aboard tuna vessels for any purpose without warrant. The panel held that express statutory authority was required to authorize the warrantless surveillance program. (Pet. App. pp. 36a-44a.)

En banc, a divided Ninth Circuit (not including any member of the original panel) reversed, holding that the regulation was within the "implied authority" of the Secretary and, assuming *arguendo* that the placement of agents constituted a search, it fell within the pervasively regulated industry exception to the Fourth Amendment warrant requirement. The *en banc* majority specifically held that express statutory authority for warrantless searches was not required under the exception. (Pet. App. pp. 1a-21a.) Judges Pregerson and Nelson wrote concurring opinions. Judge Tang wrote a dissenting opinion joined in by Judge Ferguson, and in part by Judge Canby. Judge Ferguson wrote a separate dissenting opinion.

REASONS FOR GRANTING THE WRIT

A. Introduction

This case has generated seven separate opinions by the fourteen appellate judges who have considered it. The case presents significant issues under the Fourth Amendment involving the authority of an administrative agency to design its own warrantless law enforcement scheme allowing extended searches without any reasonable cause, for the purpose of detecting criminal conduct that has not yet occurred and may never occur.

In reversing the district court, the *en banc* majority upheld an unprecedented administrative plan of compelled live-in government surveillance. If this decision stands, government agents will, for the first time, be empowered to live among and monitor the activities of individuals day-by-day, week-by-week, for up to three uninterrupted months, and to report back to those responsible for initiating criminal prosecutions and civil penalty proceedings any incriminating evidence that they may discover.

This extraordinary "policeman-in-residence" program is not authorized by any warrant, or probable cause, or even express congressional grant. It derives instead from a 1981 agency regulation.

As we discuss below, there can be no doubt that the installation of government surveillance agents aboard fishing vessels is overwhelmingly intrusive and constitutes a search within the meaning of the Fourth Amendment. Congress was certainly aware that a fishing vessel at sea is not merely the fisherman's place of business, but is as well his home-away-from-home. In enacting the MMPA, Congress was careful to provide a far stricter search and seizure standard, permitting warrantless searches only if there is reasonable cause to believe a violation exists, which is not the case here.

The *en banc* majority brushed aside this congressionally mandated standard for warrantless searches, holding that in view of his broad rule-making authority, the Secretary had the power to confer on himself what amounts to an unlimited authority to search without restriction. No prior court, to our knowledge, has ever declared that an executive enforcement officer may independently define and determine his own warrantless search authority, a doctrine fundamentally at odds with the Fourth Amendment.

This Court has adhered to the principle that, under the Fourth Amendment, an administrative search must be authorized by a warrant absent exigent circumstances or consent. The rare exceptions to this principle have occurred in situations where Congress itself has determined that warrantless inspection is essential to enforcement of a regulatory act, and has expressly authorized it. In this case the *en banc* majority, by endorsing a warrantless and standardless administrative search scheme that not even Congress has expressly authorized, has placed itself in conflict with these decisions.

The majority's opinion leaves regulatory agencies free to determine, unchecked by the independent judgment of an impartial magistrate or of the Congress, when, where, whom and how long they may search without a warrant, an unbridled discretion no law enforcement agency has ever been granted under the Fourth Amendment. The only limits on the Secretary's arrogated search authority here are those set by himself.

Moreover, by eliminating even the rudimentary requirement that there be necessity for a particular warrantless search, the *en banc* majority has

reduced the Fourth Amendment's protections to a matter of administrative convenience, and issued an invitation to those charged with the enforcement of the myriad federal and state regulatory statutes to opt for on-site police surveillance based solely upon expediency and cost-effectiveness.

It is no answer to say, as does the *en banc* majority, that the on-board surveillance is simply a condition of doing business and that fishermen are free to avoid such warrantless scrutiny by not applying for a permit to fish. If this rationale were applied to all industries within the regulatory power of Congress, with participation in them conditioned upon a waiver of privacy rights, the combination of regulation and waiver would devour the Fourth Amendment. A citizen cannot be forced to the Hobson's Choice between his constitutional rights and his job.

Unless this Court grants review, the decision of the *en banc* majority will constitute a final resolution of the significant constitutional and statutory issues presented by this case. The United States tuna purse-seine fleet, which is the subject of the challenged regulation, is based almost exclusively in Southern California, as is the holder of the general permit. The fishing area within the purview of the regulation is the eastern tropical Pacific Ocean. The impact of the regulation, though considerable, is, for all practical purposes, geographically circumscribed by the jurisdiction of the Ninth Circuit. Thus the decision of the *en banc* majority of the Ninth Circuit will be final for the affected fishermen and the entire tuna industry unless this Court grants certiorari.

B. The Regulation is Invalid Under the Statute

The installation of government surveillance agents aboard tuna purse-seine vessels is unquestionably a search within the Fourth Amendment. Under *Camara v. Municipal Court*, 387 U.S. 523 (1967) and *See v. City of Seattle*, 387 U.S. 541 (1967), as reaffirmed in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), the entry of government agents upon residential or commercial premises to conduct inspections or investigations, no matter how benign or "administrative," is a search triggering traditional Fourth Amendment protections. At the core of the Fourth Amendment is the right to be free from arbitrary governmental instrusion, *Camara*, 387 U.S., at 528, or as Justice Brandeis termed it, the "right to be let alone." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (dissent).

Moreover, the premises involved here are not simply commercial premises. Unlike a stone quarry, *Donovan v. Dewey*, 452 U.S. 594 (1981), or a gun shop, *United States v. Biswell*, 406 U.S. 311 (1972), a fishing vessel at sea is not merely a place of employment, it is the fisherman's floating home, the very "framework of his existence." *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 732 (1943).

Rather than installing an electronic video and listening device on these premises, the agency here installs a government agent. Both law enforcement activities clearly constitute a search. That the agency has given advance notice makes this no less a search than if an agency announced before hand that it was going to video-tape all activities occurring on one's premises.

Thus, the decisions of this Court leave no doubt that the boarding of a tuna purse-seiner by a government agent armed with log books, suitcase and toothbrush for a 90-day encampment, coupled with a mandate to detect evidence of criminal conduct by the captain and crew with whom he bunks and takes his meals, is a search within the Fourth Amendment.[6]

As both the defendants and the *en banc* majority conceded, no provision of the MMPA expressly authorizes the warrantless search of fishing vessels prescribed by the regulation in question. "It is quite true that the MMPA does not expressly confer upon the Secretary a power to impose, as a condition of obtaining a permit, the stationing of an observer on a vessel." (*En banc* majority opinion, Pet. App. 9a). Indeed the only express authority for any type of observer placement is contained in Section 1381 of the Act, which authorized on-board government observers on a space-available basis for observations related to research and development of improved fishing gear and techniques for a two-year period. It is undisputed that this section had no law enforcement implications and that it expired by its own terms on October 21, 1974.

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[6] The *en banc* majority could not reach accord on this crucial threshold issue. Judge Pregerson, concurring, thought no search was involved. (Pet. App. 21a.) Judge Nelson, concurring, believed it "over-whelmingly intrusive," a "massive invasion of privacy" and a search pure and simple. (Pet. App. 22a.) Judges Tang, Ferguson and Canby, dissenting, concluded there was a search. (Pet. App. pp. 28a, 31a.) The majority opinion equivocated, but assumed *arguendo* that a search was involved. (Pet. App. 16a.) This ambivalence and the division of the court suggest continuing difficulties in applying the "expectation of privacy" test of *Katz v. United States*, 389 U.S. 347 (1967).

Even more significantly, however, Congress laid down a specific search and seizure standard in the Act, 16 U.S.C. § 1377. This it could do, as ". . . Congress has broad authority to fashion standards of reasonableness for searches and seizures." *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970). The standard selected by Congress authorizes searches under the MMPA without a warrant only if there is reasonable cause to believe the vessel or anyone on board is in violation of the act or regulations. 16 U.S.C. § 1377(d)(2).

However, under the administrative scheme at issue here, government agents are permitted to board vessels and make these ships their living quarters for months on end although they have no warrant, no reasonable cause to believe a violation exists, and indeed no cause whatever even to suspect that a violation will occur. Despite the explicit standard provided in the Act for warrantless searches, the *en banc* majority held that the broad rule-making authority conferred on the Secretary *impliedly* empowered him to adopt a different standard by regulation. (Pet. App. 9a, 15a.) This decision makes a shambles of the statutory language and scheme.[7]

First, the search and seizure provision in Section 1377 is both a grant of authority and a limitation. Power to search without a warrant is granted only if there is reasonable cause. It makes absolutely no sense to suppose that Congress placed a statutory restriction on the administrator's power to search and yet at the same time granted the adminstrator the power to abrogate that standard as he sees fit.

Second, the *en banc* majority's construction hands over to the administrator the power to determine for himself when, where and whether

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[7] The *en banc* majority's sole justification for this extraordinary construction is that the paragraph containing the search and seizure standard is preceded by an introductory phrase "in addition to any other authority conferred by law." The majority states in conclusory fashion that "The regulation prescribing the observer program comes within the meaning of 'other authority conferred by law' as used in section 1377." (Pet. App. 15a.) This *ipse dixit* gives no clue regarding how the prefatory phrase may be read to give the Secretary power to abrogate the specific search and seizure standard laid down in Section 1377. Judge Tang's dissent scores this omission, pointing out that such a reading would render the section meaningless and self-emasculating. (Pet. App. 26a.) Had Congress intended the Secretary to have the power to modify the statutory standard, it would have done so in clear terms and not obliquely. And had Congress intended that the restricted observer placement authorized by Section 1381 be continued and expanded into a law enforcement device, it would not have provided for its expiration in 1974.

he may conduct searches without a warrant, an unbridled discretion prohibited by the Fourth Amendment. This Court's holding in *United States v. United States District Court*, 407 U.S. 297, 316 (1972) is so directly on point that it is appropriate to quote it at length:

> "The Fourth Amendment does not contemplate the executive officers of government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate and to prosecute [Citation omitted]. *But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks.* The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech." [Emphasis added.]

In *Colonnade* this Court invalidated a forcible entry of a liquor storeroom not expressly authorized by statute, stating: "Under the existing statutes, Congress selected a standard that does not include forcible entries without a warrant." 397 U.S. 70, at 77 (1970). So too here, Congress selected a standard that does not include warrantless searches without reasonable cause, and the administrator cannot override that statutory standard by regulation.

C. The Regulation Violates the Fourth Amendment

Warrantless searches are generally unreasonable.

> ". . . [E]xcept in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it be authorized by a valid search warrant." *Camara v. Municipal Court*, 387 U.S. 523, at 528-9 (1967); See, also, *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978).

As discussed above, the stationing of government surveillance agents aboard tuna purse-seine vessels is a search within the Fourth Amendment. Since this insinuation of government agents is without warrant, reasonable cause or express statutory authority, the general Fourth

Amendment rule renders the regulation unconstitutional unless some exception applies.

The *en banc* majority thought that the regulation fell within the "pervasively regulated industry" exception to the warrant requirement. (Pet. App. pp. 17a-20a.) In reaching this conclusion the majority seriously misread this Court's decisions recognizing an extremely narrow exception, decisions that the Court described in *Barlow's* as "responses to relatively unique circumstances." 436 U.S., at 313.[8]

The elements common to *Colonnade, Biswell* and *Dewey* are: (a) a closely regulated industry; (b) a congressional determination, to which this Court deferred, that unannounced, frequent warrantless inspections were necessary because enforcement would be frustrated by a warrant requirement; (c) an express congressional authorization of warrantless inspection; and (d) statutory limitations upon the time, place and scope of such inspections, tantamount to the protections of a warrant.

As explained in *Dewey*, legislatively prescribed warrantless inspection schemes meeting these criteria may be reasonable under the Fourth Amendment, and this greater latitude for warrantless inspections of commercial property is based upon a lesser expectation of privacy in such premises than in homes. 452 U.S., at 598-9. By definition the exception is therefore inapplicable to residences, which in itself places this case outside the exception. As discussed above, a fishing vessel at sea is not simply a place of employment. It is also the fishermen's home. Indeed, Congress recognized as much by requiring reasonable cause for warrantless searches of vessels under the MMPA.

Moreover, unlike this case, in each of the decisions upholding warrantless inspections, *Colonnade, Biswell* and *Dewey*, Congress had expressly authorized such inspections. The *en banc* majority viewed this express congressional consideration and approval as irrelevant, a factor that was

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[8] *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), upheld warrantless entry of premises dispensing alcoholic beverages as authorized by the Internal Revenue Code, but struck down forcible entry of a storeroom not expressly authorized by the statute. *United States v. Biswell*, 406 U.S. 311 (1972), upheld warrantless entry of establishments dealing in firearms authorized by the Gun Control Act of 1968. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), struck down warrantless entry of commercial premises dealing in interstate commerce under OSHA. *Donovan v. Dewey*, 452 U.S. 594 (1981), upheld warrantless inspections of stone quarries mandated by the Federal Mine Safety & Health Act.

not an integral part of the Court's holdings (Pet. App. 18a.) But, as we next discuss, express statutory authority for warrantless inspection is a *sine qua non* of the exception.

In *Biswell* the Court held that "inspection may proceed without a warrant *where expressly authorized by statute*." 406 U.S., at 317. In *Dewey*, the Court's rationale for upholding quarry inspections under the Federal Mine Safety & Health Act was that Congress had specifically determined that warrantless inspection was necessary for enforcement of the Act, had mandated warrantless inspection in the Act, and had provided sufficient limits upon the discretion of the executive and protections of privacy interests in the Act itself. 452 U.S., at 603-605. In both of the cases the Court acknowledged its deference to the congressional determination, embodied in the act, that warrantless inspection was essential to enforcement. *Biswell*, 406 U.S., at 315-316; *Dewey*, 452 U.S., at 602-603. And in *Colonnade*, the Court held in no uncertain terms that even "Where Congress has authorized inspection but made no rules governing the procedures that inspectors must follow, the Fourth Amendment and its various restrictive rules apply." 347 U.S., at 77.

Express statutory authority is required under the narrow pervasively regulated industry exception for quite a fundamental reason. The Fourth Amendment warrant requirement provides an essential check upon the presumptively unbridled zeal of the executive to search. The independent, impartial judgment of the magistrate stands between the citizen and the agents of the government, assuring that there is probable cause to justify any intrusion of privacy, and that the intrusion will be appropriately limited in location, time and objective.

As *Colonnade*, *Biswell* and *Dewey* demonstrate, the intermediary role of the magistrate may sometimes be filled by the Congress (subject, of course, to the scrutiny of the Court) in setting standards for warrantless searches in carefully limited circumstances. As a separate branch of the government and a representative body responsible to the citizens, Congress may with some degree of impartiality and detachment give advance authorization for certain types of warrantless inspection by the executive or enforcement branch which it deems essential to carrying out its regulatory acts. This Court has acknowledged in *Colonnade*, *Biswell* and *Dewey* that it has deferred to this congressional judgment where appropriate, and has not hesitated to intervene where it is not. *Barlow's*, 436 U.S. 307.

But it is impermissible under the Fourth Amendment for the executive or administrative agency to decide for itself how its discretion to search is to be limited. Indeed, allowing the administrator charged with enforcement to determine the scope of his own power to search, under a theory of "implied authority," is to endorse unbridled executive discretion. This is why under the Fourth Amendment express statutory authority for warrantless searches is a fundamental prerequisite.

Under the *en banc* majority's rationale, however, it is not Congress which decides the scope and limits of search authority, but the Secretary, the searcher himself. In failing to recognize the requirement of express statutory authority for warrantless searches, and sustaining the administrator's power to determine his own search authority, the *en banc* majority placed itself in conflict with the decisions of this Court and the Fourth Amendment.[9]

Moreover, the *en banc* majority misperceived another critical element of *Biswell - Dewey*, by failing to address the prerequisite of the necessity for warrantless search. *Biswell* and *Dewey* validated the warrantless inspections there involved, and distinguished *See*, upon the ground that Congress had determined that warrantless inspection was essential to enforcement and the requirement of a warrant would frustrate inspection. *Biswell*, 406 U.S., at 315-316; *Dewey*, 452 U.S., at 600, 602-603. Similarly, *Barlow's* struck down warrantless inspection under OSHA in part because warrantless inspection was not demonstrably essential. 436 U.S., at 316-317, 324.

Regardless of the need for a search, the question remains whether there is a need for the search to occur without a warrant. It is a question the majority did not answer, as the dissenters pointed out. (Pet. App.

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[9] A parallel principle also mandates express congressional authority for regulations touching upon sensitive constitutional rights. This principle is succinctly expressed in *Greene v. McElroy*, 360 U.S. 474, 507 (1959), denying the implied authority of the Department of Defense to adopt procedures for revoking security clearances not according a right of confrontation:

> ". . . explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. *Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them.*" (Emphasis added.)

29a-30a, 34a.) The *en banc* majority failed to determine, or require a showing of, the necessity for the warrantless search involved here, apparently under the misapprehension that necessity for employment of the particular enforcement technique (on-board surveillance) sufficed. (Pet. App. pp. 11a, 17a-20a.) In so doing the majority fell into the erroneous mode of analysis pointed out in *Camara*, 387 U.S., at 533 (1967): "The question is not, at this stage at least, whether these inspections may be made, but whether they may be made without a warrant."

In any event, the majority below could not have made the requisite determination that the warrantless search in question is necessary to enforcement of the MMPA, since the record demonstrates the contrary. The factors alluded to in *Biswell* and *Dewey* as manifesting the necessity for warrantless inspection are the imperatives of surprise and frequency of inspection. *Biswell*, 406 U.S., at 316, *Dewey*, 452 U.S., at 603. Those factors are conspicuously absent in the instant case.

Ironically, the *en banc* majority hoists itself on its own petard when it acknowledges that "Thus, the surprise element of many warrantless inspections is lacking here." (Pet. App. 20a.) As the majority itself points out, the regulation requires that tuna vessel owners be given advance notice by certified letter of the stationing of an observer on their vessel. The NMFS Field Manual establishes a predeparture conference between the owner, captain, observer and an agency official. The regulation requires the vessel to give the agency five days notice prior to departure. As the dissents note (Pet. App. 30a, 34a), this advance scheduling and absence of surprise contravene the underlying rationale for warrantless inspection. Further, since federal observers are assigned to approximately one-third of the purse-seine fishing trips each year, no undue administrative burden would be imposed upon the system if warrants are required.

In dispensing with the requirement that warrantless search be necessary to enforcement, the *en banc* majority decision not only conflicts with the decisions of this Court under the pervasively regulated industry exception, it effectively reduces exceptions to the warrant requirement to a matter of administrative convenience and cost-effectiveness, which are not the criteria by which Fourth Amendment rights have been measured. The warrant is not "an inconvenience to be somehow 'weighed' against the claims of police efficiency." *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971).

Finally, the *Colonnade - Biswell - Dewey* cases all involved administrative "spot" inspections of the type where an investigator enters upon commercial premises to conduct a brief physical inspection and then departs. With such intrusions "the possibilities of abuse and the threat to privacy are not of impressive dimensions . . ." *Biswell*, 406 U.S., at 317. The *en banc* majority's extension of the pervasively regulated industry exception to the "massive" continuous invasion of privacy represented by the "policeman-in-residence" scheme here, however, is an unwarranted qualitative and quantitative leap from the brief "spot" inspections approved by this Court. At the very least, if such an unprecedented program of continuous, in-residence law enforcement is constitutionally permissible, the decision to utilize it should be clearly made and declared by Congress, not by a mere administrator, neither elected by nor responsive to the citizens.

D. The Regulation Imposes an Unconstitutional Condition

The government cannot make a business dependent upon a permit and then make an otherwise unconstitutional requirement a condition to the permit. *Frost v. Railroad Commission*, 271 U.S. 583 (1926); *United States v. Chicago Milwaukee, Etc. R.R.*, 282 U.S. 311 (1931); *Spevack v. Klein*, 385 U.S. 511 (1967). "If so, constitutional guarantees, so carefully safeguarded against direct assault, are open to destruction by the indirect, but no less effective process of requiring a surrender, which, though in form voluntary, in fact lacks none of the elements of compulsion." *Frost v. Railroad Commission*, 271 U.S. 583, at 593.

The *en banc* majority appears to suggest that the regulation may be upheld because it conditions a permit on submission to warrantless search, and a tunaboat captain is free not to submit to such inspection by declining to seek a permit. (Pet. App. pp. 18a, 19a.) That position is not supported by the citation to *Biswell*, 406 U.S., at 315-16, on which it relies.

Although *Barlow's* discussed *Colonnade* and *Biswell* in terms of "implied consent," 436 U.S., at 313, the Court was careful in *Dewey* not to predicate its rationale upon that basis, a factor noted in the dissent, 452 U.S. at 610-612.

Not only is there no true consent involved in the acquiescence in a condition to a permit, but application of this rationale to all of the industries

within the ambit of Congress' regulatory power would lead to the inevitable extinguishment of the requirement of a warrant to search commercial property, a result contrary to the general rule of *See v. City of Seattle*, 387 U.S. 541 (1967).

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit *en banc*.

Respectfully submitted,

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No. 83-1784

IN THE

Supreme Court of the United States

October Term, 1983

JOHN R. BALELO, et al.,

Petitioners,

v.

MALCOLM BALDRIGE, Secretary of Commerce of the United States, et al.,

Respondents.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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John R. BALELO, Andrew Castagnola, Leo Correia, Manuel S. Jorge, Bryan R. Madruga, Harold Medina, John A. Silva, Ralph F. Silva, Jr., George Sousa, Manuel S. Vargas, Jr., John B. Zolezzi, Jr., Plaintiffs-Appellees,

v.

Malcolm BALDRIGE, Secretary of Commerce of the United States, Richard A. Frank, Administrator, National Oceanic and Atmospheric Administration and Terry Leitzell, Assistant Administrator for Fisheries, National Marine Fisheries Service, Defendants-Appellants,

Environmental Defense Fund, Inc., et al., Intervenors-Defendants-Appellants.*

UNITED STATES of America, Plaintiff,

v.

$50,178.80, THE MONETARY VALUE OF 57 TONS OF TUNA, Defendant,

Gladiator Fishing, Inc., Claimant.**

Nos. 81-5806, 81-5807 and 82-5433.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted En Banc
Sept. 15, 1983.

Decided Jan. 24, 1984.

*Appeal from the United States District Court for the Southern District of California Gordon Thompson, Jr., District Judge, Presiding.

**Appeal from the United States District Court for the Central District of California Laughlin Waters, District Judge, Presiding.

Before BROWNING, SNEED, KENNEDY, ANDERSON, TANG, SCHROEDER, PREGERSON, ALARCON, FERGUSON, NELSON and CANBY, Circuit Judges.

ALARCON, Circuit Judge:

In *Balelo v. Klutznick*, 519 F.Supp. 573 (S.D.Cal.1981), plaintiffs-appellees, who are captains of tuna purse seiners (hereinafter the Captains), instituted this action against defendants-appellants (hereinafter the Secretary) seeking declaratory and injunctive relief.[1] The district court granted a declaratory judgment invalidating subsection (f) of regulation 50 C.F.R. § 216.24 (1981) promulgated by the Secretary of Commerce[2] pursuant to the Marine Mammal Protection Act (hereinafter MMPA), 16 U.S.C. § 1371.

Under the regulation, the Captains are permitted to take porpoise during commercial fishing operations only if they comply with certain conditions.[3] They must allow government observers to board and accompany the vessel on regular fishing trips "for the purpose of research or observing operations." 50 C.F.R. 216.24(f). The regulation further authorizes the collection of data which may be used in MMPA enforcement proceedings. *Id.* The district court ruled that the regulation was unconstitutional only insofar as it permitted the use of observer collected data in MMPA enforcement proceedings.

In *United States v. $50,178.80, the Monetary Value of 57 Tons of Tuna and Gladiator Fishing, Inc.*, Cv. No. 79-4466-LEW (MX)

1. Defendants-appellants include: the Secretary of Commerce; the Administrators of National Oceanic and Atmospheric Administration (NOAA) and National Marine Fisheries Service (NMFS), the Assistant Administrator for Fisheries; the Environmental Defense Fund, Inc.; and the Defenders of Wildlife.

2. The Secretary delegated authority to carry out the provisions of the MMPA to the NOAA Administrator and the Assistant Administrator for Fisheries of the NMFS.

3. *See, e.g.*, 50 C.F.R. § 216.24(a)(1) (1981): which states that:

> No marine mammals may be taken in the course of a commercial fishing operation unless: The taking constitutes an incidental catch . . ., a general permit and certificate(s) of inclusion have been obtained and such taking is not in violation of such permit, certificate(s) and regulation.

Section (c)(2) provides that "[i]n order to receive a certificate of inclusion, the operator shall have satisfactorily completed required training." 50 C.F.R. § 216.25(c)(2) (1981). The certificate of inclusion must be renewed annually.

(C.D.Cal. April 21, 1982), a civil forfeiture proceeding, the district court denied a motion to suppress evidence of observer collected data.

We have taken these matters en banc to consider whether the regulation is valid under the MMPA, and if so, whether it violates the fourth amendment. For the reasons set forth below, we have concluded that: (1) the regulation was authorized under the broad rule-making power delegated by Congress to the Secretary; (2) the regulation is consistent with the policies and objectives of the MMPA; and (3) the regulation falls within the pervasively regulated industry exception to the warrant requirement of the fourth amendment.

FACTUAL AND STATUTORY BACKGROUND

The Captains utilize a method of fishing for yellow-fin tuna which results in the incidental taking[4] of certain species of porpoise. Porpoise tend to swim in association with yellow-fin tuna in the eastern tropical Pacific. The porpoise is larger and more active on the ocean's surface. Thus, the Captains can locate yellow-fin tuna by spotting porpoise. Purse seine nets are then set around schools of porpoises. The tuna swimming beneath them are encircled when the net is closed or "pursed" around them. During this operation, significant numbers of porpoise are injured or drowned. Their carcasses are discarded into the sea. In the two years preceding the enactment of the MMPA in 1972, the incidental taking resulted in more than 600,000 porpoise mortalities. *Committee for Humane Legislation Inc. v. Richardson*, 414 F.Supp. 297, 300 (D.D.C.), *aff'd*, 540 F.2d 1141 (D.C.Cir.1976).

Congress' overriding purpose in enacting the MMPA was the protection of marine mammals. Congress declared the immediate goal of the MMPA to be "that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and

4. 50 C.F.R. § 216.3 (1981) provides that:

> "Take" means to harass, hunt, capture, collect, or kill, or attempt to harass, hunt, capture, collect, or kill, any marine mammal, including, without limitation, any of the following: The collection of dead animals, or parts thereof; the restraint or detention of a marine mammal, no matter how temporary; tagging a marine mammal; or the negligent or intentional operation of an aircraft or vessel, or the doing of any other negligent or intentional acts which result in the disturbing or molesting of a marine mammal.

serious injury rate." 16 U.S.C. § 1371(a)(2) (1976-1982). To accomplish this goal, Congress imposed a moratorium on the taking and importing of marine mammals. 16 U.S.C. § 1371(a) (1976-1982). A two-year exemption from the moratorium for the taking of marine mammals incidental to commercial fishing operations was allowed. 16 U.S.C. § 1371(a)(2) (1976), *amended by* 16 U.S.C. § 1371(a)(2) (1982). The legislative history indicates that the exemption was provided "for the refinement of these fishing gear modifications" which industry representatives proffered as a solution to the porpoise mortality problem. *Committee for Humane Legislation*, 414 F.Supp. at 301.[5] In addition, the Act directed the "immediate" undertaking of a research and development program to devise improved fishing methods and gear so as to reduce the incidental taking of marine mammals in connection with commercial fishing. 16 U.S.C. § 1381(a) (1976).

Although the commercial fishing industry was exempted for two years from the moratorium, the incidental taking of mammals during this time was conditioned on industry compliance with section 1381.[6] *See, e.g.*, 16

5. The testimony quoted by the court is that of Captain Joe Medina who reported the results of a new and old tests and asserted that the problem was "licked." *Committee for Humane Legislation, Inc. v. Richardson*, 414 F.Supp. at 301 n. 8 (quoting *Hearings on H.R. 10420 Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 92d Cong., 1st Sess., part 1, at 348 (testimony of Captain Joe Medina)). Thus, "Congressman Pelly . . . proposed a temporary moratorium . . . 'to give the tuna fisheries association an opportunity to develop what they indicate is certainly a solution.'" *Committee for Humane Legislation*, 414 F.Supp. at 301 n. 9 (quoting *Hearing on H.R. 10420, supra*, at 407).

6. 16 U.S.C. § 1381 (1976) provides:

> Commercial fisheries gear development
>
> (a) *Research and development program; report to Congress; authorization of appropriations.*
>
> The Secretary of the department in which the National Oceanic and Atmospheric Administration is operating (hereinafter referred to in this section as the "Secretary") is hereby authorized and directed to immediately undertake a program of research and development for the purpose of devising improved fishing methods and gear so as to reduce to the maximum extent practicable the incidental taking of marine mammals in connection with commercial fishing. At the end of the full twenty-four calendar month period following the date of the enactment of this Act [enacted Oct. 21, 1972], the Secretary shall deliver his report in writing to the Congress with respect to the results of such research and development. For the purposes of this section, there is hereby authorized to be appropriated the sum of $1,000,000 for the fiscal year ending June 30, 1973, and the same amount for the next fiscal year. Funds appropriated for this section shall remain available until expended.

U.S.C. § 1371(a)(2) (1976), *amended by* 16 U.S.C. § 1371(a)(2) (1982). Subsection (d) of section 1381 requires the industry to allow agents of the Secretary "to board and to accompany any commercial fishing vessel . . . on a regular fishing trip for the purpose of conducting research or observing operations in regard to the development of improved fishing methods and gear as authorized by this section." 16 U.S.C. § 1381(d) (1976-1982). Since expiration of this two-year exemption in 1974, the taking of marine mammals incidental to commercial fishing must be pursuant to a permit issued by the Secretary, 16 U.S.C. § 1371(a)(2), "subject to regulations prescribed by the Secretary in accordance with section 1373." 16 U.S.C. § 1371(a)(2) (1976-1982).

Section 1373 requires the Secretary to consider, in promulgating the regulations, the "existing and future levels of marine mammal species and population stocks," 16 U.S.C. § 1373(b)(1) (1976-1982), and the "marine ecosystem and related environmental considerations," 16 U.S.C. § 1373(b)(3) (1976-1982). The regulations may also restrict the taking of porpoise by species, number, age, sex, or other factors. 16 U.S.C. § 1373(c) (1976-1982). In addition to the rule-making authority conferred upon the Secretary, 16 U.S.C. § 1373, the MMPA provides for

> (b) *Reduction of level of taking of marine mammals incidental to commercial fishing operations.*
> The Secretary, after consultation with the Marine Mammal Commission, is authorized and directed to issue, as soon as practicable, such regulations, covering the twenty-four-month period referred to in section [1371] of this title as he deems necessary or advisable, to reduce to the lowest practicable level the taking of marine mammals incidental to commercial fishing operations. Such regulations shall be adopted pursuant to section 553 of title 5, United States Code. In issuing such regulations, the Secretary shall take into account the results of any scientific research under subsection (a) of this section and, in each case, shall provide a reasonable time not exceeding four months for the persons affected to implement such regulations.
>
> * * * * * *
>
> (d) *Research and observation.*
> Furthermore, after timely notice and during the period of research provided in this section, duly authorized agents of the Secretary are hereby empowered to board and to accompany any commercial fishing vessel documented under the laws of the United States, there being space available, on a regular fishing trip for the purpose of conducting research or observing operations in regard to the development of improved fishing methods and gear as authorized by this section. Such research and observation shall be carried out in such manner as to minimize interference with fishing operations. The Secretary shall provide for the cost of quartering and maintaining such agents. No master, operator, or owner of such a vessel shall impair or in any way interfere with the research or observation being carried out by agents of the Secretary pursuant to this section.

the imposition of civil and criminal penalties for violations of the provisions of the Act or the regulations or permits issued thereunder. 16 U.S.C. § 1375(a) (1982).

In 1974, the Secretary promulgated a regulation, 50 C.F.R. § 216.24(f) (1974), in language virtually identical to that set forth in section 1381,[7] the statutory observer program, that required the placement of observers on vessels.

Pursuant to the powers granted under the MMPA, the Secretary promulgated the regulation at issue here. The challenged regulation, effective January 1, 1981, requires as a condition of engaging in fishing operations that vessel owners:

> (1) . . . [S]hall, upon the proper notification by the [NMFS], allow an observer duly authorized by the secretary to accompany the vessel on any or all regular fishing trips for the purpose of conducting research and observing operations, *including collecting information which may be used in civil or criminal penalty proceedings, forfeiture actions, or permit or certificate sanctions.*
>
> * * * * * *
>
> (4) The Secretary shall provide for the payment of all reasonable costs directly related to the quartering and maintaining of such observers on board such vessels. A vessel certificate holder who has been notified that the vessel is required to carry an observer, via certified letter from the National Marine Fisheries Service, shall notify the office from which the letter was received at least five days in advance of the fishing voyage to facilitate observer placement. *A vessel certificate holder who has failed to comply with the provisions of this section may not engage in fishing operations for which a general permit is required.*

50 C.F.R. § 216.24(f) (1981) (emphasis added).[8]

7. 50 C.F.R. § 216.14(f) (1974), *amended by* 50 C.F.R. § 216.14(f) (1981) provides in part:

> Any duly authorized agents of the Secretary may from time to time, after timely oral or written notice to the vessel owner . . ., board and/or accompany commercial fishing vessels . . . on regular fishing trips, for the purpose of conducting research or observing operations . . . .

To compare the text of section 1381(d), the statutory observer program, *see* note 6 *supra*.

8. Subsections (2) and (3) and section (g) provide:

> (2) Research and observation duties shall be carried out in such a manner as to minimize interference with commercial fishing operations. The navigator shall

The Captains appear to have no objection to the observers' scientific role on board ship. Their objection is directed solely at those provisions of the 1981 regulation which authorize the use of observer collected data in enforcement proceedings. In the Captain's opening brief we are told that: "The District Court's injunction properly stripped the observer program of its unauthorized and impermissible *search* function and restored it to its pristine role of pure scientific fact-gathering." Appellees' opening brief at 9 (emphasis added).

IMPLIED CONGRESSIONAL AUTHORIZATION

[1] The first issue we must address is whether the 1981 regulation is authorized by the rule-making power delegated by Congress to the Secretary. *See FCC v. Schreiber*, 381 U.S. 279, 290, 291, 85 S.Ct. 1459, 1467, 1468, 14 L.Ed.2d 383 (1965) (Court first addressed whether regulation promulgated by agency was authorized by statute); *Haig v. Agee*, 453 U.S. 280, 101 S.Ct. 2766, 69 L.Ed.2d 640 (1981) (same).

The Captains argue that the regulation prescribing the observer program is invalid because it was not expressly authorized by Congress. The Captains contend that the observer program is a constitutionally ques-

> provide true vessel locations by latitude and longitude, accurate to the nearest minute, upon request by the observer. No owner, master, operator, or crew member of a certified vessel shall impair or in any way interfere with the research or observations being carried out.
>
> (3) Marine mammals killed during fishing operations which are accessible to crewmen and requested from the certificate holder or master by the observer shall be brought aboard the vessel and retained for biological processing, until released by the observer for return to the ocean. Whole marine mammals designated as biological specimens by the observer shall be retained in cold storage aboard the vessel until retrieved by authorized personnel of the National Marine Fisheries Service when the vessel returns to port for unloading.
>
> * * * * * *
>
> (g) *Penalties and rewards:* Any person or vessel subject to the jurisdiction of the United States shall be subject to the penalties provided for under the Act for the conduct of fishing operations in violation of these regulations. The Secretary shall recommend to the Secretary of the Treasury that an amount equal to one-half of the fine incurred but not to exceed $2,500 be paid to any person who furnishes information which leads to a conviction for a violation of these regulations. Any officer, employee, or designated agent of the United States or of any State or local government who furnishes information or renders service in the performance of his official duties shall not be eligible for payment under this section.
>
> 50 C.F.R. § 216.24(f), (g) (1981).

tionable method of enforcing regulatory schemes and that under *Greene v. McElroy*, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959) authorization for such a rule cannot be found absent an explicit congressional grant. *Greene* does not stand for the proposition that Congress must expressly authorize any action which might be challenged on constitutional grounds. Rather, the case indicates that Congress will not be presumed to have authorized agency methods which depart radically from accepted norms. In the matter before us, we are being asked to decide whether a particular warrantless search is authorized by Congress and whether that search violates the fourth amendment. Merely because some warrantless searches may violate the fourth amendment it does not follow that no warrantless search may be undertaken pursuant to federal law absent express congressional authorization. Unlike the types of procedures at issue in *Greene*, certain types of warrantless searches have traditionally been recognized as constitutionally valid. *See Henderson v. United States*, 390 F.2d 805 (9th Cir.1967) (border searches); *United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973) (search incident to arrest); *South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976) (inventory searches); *Warden v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967) (exigent circumstances); *Donovan v. Dewey*, 452 U.S. 594, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981) (regulated industry searches). Nothing in *Greene* prohibits us from determining whether Congress implicitly authorized the observer program. In our discussions below, we reject the contentions that the observer program substantially departs from accepted methods of enforcing regulatory schemes, and the *Greene* case is therefore inapplicable.

To determine whether the regulation was authorized by Congress, we must analyze the language of the statute. *Haig v. Agee*, 453 U.S. 280, 289-90, 101 S.Ct. 2766, 2773, 69 L.Ed.2d 640 (1981). Section 1371 of the MMPA provides in pertinent part:

> There shall be a moratorium on the taking and importation of marine mammals. . . . Marine mammals may be taken incidentally in the course of commercial fishing operations and permits may be issued therefor under section 1374 . . . subject to regulations prescribed by the Secretary in accordance with section 1373. . . . The Secretary . . . is authorized and directed . . . to determine when, *to what extent, if at all, and by what means, it is compatible with this chapter to waive the requirements of this section so as to allow taking, or importing of any marine mammal*, . . . and to adopt suitable regulations, issue permits, and make determinations . . . permitting and governing such taking

and importing. . . .
16 U.S.C. § 1371 (1976-1982) (emphasis added).

Section 1373 provides that the Secretary "shall prescribe such regulations with respect to the taking . . . as he deems *necessary and appropriate to insure* that such taking will not be to the disadvantage of those species . . . and will be consistent with the purposes and policies set forth in section 1361." 16 U.S.C. § 1373(a) (1976-1982) (emphasis added). The Secretary is required to report to Congress every twelve months on the status of the species and "to describe those actions taken and those measures believed necessary, including where appropriate, the issuance of permits . . . to assure the well being of such marine mammals." 16 U.S.C. § 1373(f).

Section 1374 provides that the Secretary may issue permits and that he "shall prescribe such procedures *as are necessary to carry out this section*." 16 U.S.C. § 1374(d)(1) (emphasis added). In addition, the applicant for any permit "*must demonstrate to the Secretary that the taking* . . . under *such permit will be consistent with the purposes of this Chapter . . . and the applicable regulations established under section* [1373]." *Id.* at § 1374 (emphasis added). The Secretary may issue general permits for the "taking of marine mammals" together with regulations to cover the use of such permits which are "[c]onsistent with the regulations prescribed pursuant to section 1373 . . . and the requirements of section 1371." 16 U.S.C. § 1374(h).

It is quite true that the MMPA does not expressly confer upon the Secretary a power to impose, as a condition of obtaining a permit, the stationing of an observer on a vessel. In our view, however, that power is implicit in the broad rule-making authority expressly delegated to the Secretary. *See Haig v. Agee*, 453 U.S. at 291, 101 S.Ct. at 2773-2774 (Secretary of State's power to revoke passports is implicit in broad rule-making authority conferred upon the Secretary by the Passport Act).

The Supreme Court has admonished that even though a statute does not explicitly delegate a specific action, "particularly in light of the 'broad rule-making authority granted' . . . a consistent administrative construction of that statute must be followed by the courts '"unless there are compelling indications that it is wrong"' . . . ." *Haig v. Agee*, 453 U.S. at 291, 101 S.Ct. at 2774. (citations omitted.) Accordingly, the specific content of the regulation need not be expressly authorized. The regulation is proper so long as it conforms to the fundamental objective

of the Act, rationally complements its remedial scheme, *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11, 12, 100 S.Ct. 883, 890, 891, 63 L.Ed.2d 154 (1980), and "the policy [thereby] announced . . . is 'sufficiently substantial and consistent' to compel the conclusion that Congress approved it." *Haig*, 453 U.S. at 307, 101 S.Ct. at 2782 (quoting *Zemel v. Rusk*, 381 U.S. 1, 12, 85 S.Ct. 1271, 1279, 14 L.Ed.2d 179 (1965)). *Accord Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369, 93 S.Ct. 1652, 1660-61, 36 L.Ed.2d 318 (1973); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177, 88 S.Ct. 1994, 2005, 20 L.Ed.2d 1001 (1968) ("We may not in the absence of compelling evidence that such was not Congress' intention . . . prohibit administrative action imperative for achievement of an agency's ultimate purposes."). (citation omitted); *American Trucking Ass'n v. United States*, 344 U.S. 298, 310, 73 S.Ct. 307, 314-15, 97 L.Ed. 337 (1953) (Congress creates regulatory agencies so that they will bring to their work the expert's familiarity with industry conditions that delegating legislatures cannot be expected to possess).

In *Mourning*, the Supreme Court upheld the power of the Federal Reserve Board to promulgate regulation "Z" pursuant to the Board's broad rule-making authority under the Truth and Lending Act. 15 U.S.C. § 1604. The Court emphasized that:

> Where the empowering provision of a statute states simply that the agency may "make . . . such rules and regulations as may be necessary to carry out the provisions of this Act," . . . a regulation promulgated thereunder will be sustained so long as it is "reasonably related to the purposes of the enabling legislation."

411 U.S. at 369, 93 S.Ct. at 1660-1661. (citations omitted).

It appears to us that the regulation at issue here is consistent with the objective and directives of the MMPA. Requiring the Captains to consent to the placement of observers on their vessels as a condition of obtaining a fishing permit is reasonably related to the purposes of the enabling legislation. The paramount purpose of the Act is "the protection and conservation of marine mammals." 16 U.S.C. § 1371.[9] As the D.C.

9. In its Delcaration of Policy, Congress stated:

> [T]hat the protection and conservation of marine mammals is therefore necessary . . . . Marine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic, and it is the sense of the Congress that they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem. Whenever consistent with this

Circuit has observed, the MMPA is to be administered "for the benefit of protected species, rather than for the benefit of commercial exploitation." *Committee for Humane Legislation*, 540 F.2d at 1148.

Effective implementation of the MMPA would be impossible without the use of observers for enforcement purposes. Under the MMPA, any incidental taking of marine mammals must be pursuant to a permit issued by the Secretary. 16 U.S.C. § 1371. The permits must specify such factors as the number, kind, age, sex, and location of the mammals to be taken. 16 U.S.C. § 1374(b). Such limitations are necessary to assure that the MMPA's goal of reducing marine mammal mortality to the minimum practical is met.

The affidavit offered by the government on its motion for summary judgment discloses that the use of on-board observers is the only practicable method of enforcing the limitations in MMPA permits. The tuna vessels subject to the Secretary's regulation operate over thousands of square miles of open ocean for months at a time. No independent surveillance program could hope to be able to verify whether or not a particular vessel complied with its trip quota. Even if such a technically feasible surveillance program were available, its costs would be prohibitive. The observer program is thus "necessary and appropriate to insure that such taking will not be to the disadvantage of those species . . . and will be consistent with the purposes and policies set forth in the [MMPA]." 16 U.S.C. § 1373(a). Because the observer program is necessary for the enforcement of the MMPA, it is within the authority granted to the Secretary by Congress. *See Southwestern Cable*, 392 U.S. 157, 88 S.Ct. 1994, 20 L.Ed.2d 1001 (authority normally presumed for regulations necessary to enforce its statutory mandate); *cf. Mourning*, 411 U.S. at 371-72, 93 S.Ct. at 1662 ("That some other remedial provision might be preferable is irrelevant. We have consistently held that where reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority."). In addition, the Secretary could not fulfill his duty under the MMPA to make annual reports to Congress if the observer program were discontinued. *See* 16 U.S.C. § 1373(f); *cf. FCC v. Schreiber*, 381 U.S. at 294, 85 S.Ct. at 1469-1470 (rule promulgated by

primary objective, it should be the goal to obtain an optimum sustainable population keeping in mind the optimum carrying capacity of the habitat.

16 U.S.C. § 1361 (1976-1982).

FCC necessary to execute its duty to make annual reports to Congress).

In upholding the regulation, we are impressed by the fact that Congress, through oversight hearings, was made aware of the continued existence of the observer program. Congress was informed through hearings conducted from 1976 to 1981 that information gathered by observers might be used in penalty proceedings.[10] In 1981, Congress amended the MMPA and did not disturb the Secretary's broad-rule making authority in spite of this regulation.[11] *See Haig v. Agee*, 453 U.S. at 301 & n. 50, 101 S.Ct. at 2779 & N. 50 (quoting *Zemel v. Rusk*, 381 U.S. at 21, 85 S.Ct. at 1283 (fact that Congress left rule-making authority untouched while amending Act gives rise to presumption that Congress has adopted

10. *See, e.g., Hearings on Tuna-Porpoise Amendments Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine Fisheries*, 94th Cong., 2d Sess., Ser. 29 (1976) at 352-53 (government compliance plan to court's order in *Committee for Humane Legislation, Inc. v. Richardson*, 414 F.Supp. 297 (D.D.c.) *aff'd*, 540 F.2d 1141 (D.C.Cir.1976)); *Hearings on Oversight of the Tuna-Porpoise Problem Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 94th Cong., 2d Sess., Ser. 45 (1976) at 212 (remarks of Dr. White); *id.* at 223-24, 262 (remarks of Dr. Fox); *Hearings on Reducing Porpoise Mortality Before the House Comm. on Merchant Marine and Fisheries*, 95th Cong., 1st Sess. 3 (1977) at 209-10, 213, 216-17 (remarks of Dr. White); *Hearings of Tuna-Porpoise Oversight Before the House Comm. on Merchant Marine and Fisheries*, at 463 (remarks of Mr. Bonker); *id.* at 465-66 (remarks of Mr. McCloskey); *Hearings on Oversight into the Marine Mammal Protection Act Before the Senate Comm. on Commerce, Science, and Transportation*, 95th Cong., 1st Sess., Ser. 12 at 17 (1977) (remarks of Dr. White); *Hearings on Marine Mammal Protection Act Authorization Before Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 97th Cong., 1st Sess., Ser. 8 at 81-82 (1981) (remarks of Mr. Breaux and Mr. Burney); *id.* at 83-86 (remarks of Mr. Hertel and Mr. Burney).

11. *See* Pub.L. No. 97-58, 95 Stat. 979, *codified at* 16 U.S.C. § 1371(a)(2) (1982).

As one official explained, the observers started gathering compliance data in 1976. *Hearings on Reducing Porpoise Mortality and Tuna-Porpoise Oversight Before the Subcomm. on Fisheries and Wildlife Conservation and teh Environment of the Comm. on Merchant Marine and Fisheries*, 95th Cong., 1st Sess. 465-66 (1977). The government compliance plan submitted in accordance with the order in *Committee for Humane Legislation, Inc. v. Richardson*, 540 F.2d 1141 (D.C.Cir.1976), was also the subject of 1977 oversight hearings, *e.g., Hearings on Marine Mammal Oversight Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the Comm. on Merchant Marine and Fisheries*, 95th Cong., 1st Sess. 20-21 (1977) (use of observers to collect information on compliance is more effective than aircraft surveillance).

the construction)). Thus, as in *Haig v. Agee*, "the inference of congressional approval 'is supported by more than mere congressional inaction.'" 453 U.S. at 301, 101 S.Ct. at 2779. (quoting *Zemel v. Rusk*, 381 U.S. 1, 11-12, 85 S.Ct. 1271, 1283, 14 L.Ed.2d 179 (1965)); *cf. Fredericks v. Kreps*, 578 F.2d 555, 563 (5th Cir.1978) (en banc) (congressional oversight committee's awareness of regulations before they were put into effect reinforces determination that regulation is consistent with Congress' intent). *See also Andrus v. Allard*, 444 U.S. 51, 57, 100 S.Ct. 318, 322, 62 L.Ed.2d 210 (1979) (Court upheld regulation noting that Congress twice reviewed and amended the Act without rejecting the Department's view that it was authorized under the Eagle Protection Act, 16 U.S.C. § 688, to bar sale of preexisting artifacts); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75, 94 S.Ct. 1757, 1761-62, 40 L.Ed.2d 134 (1974) (great weight may be accorded a long standing interpretation of a statute by an agency charged with its administration especially where Congress has reenacted the statute without pertinent change; failure to repeal or revise the agency's interpretation is persuasive evidence that Congress intended the interpretation).

[2] The Captains advance two arguments against this construction. The first is that since Congress explicitly authorized funds for an observer program for only two years, 16 U.S.C. § 1381, the Secretary's regulation adopting an observer program beyond this two-year period exceeds statutory authority. As noted earlier, the legislative history suggests, and the statute itself reflects, that this program was adopted to enable the Secretary to observe the industry's utilization of advanced gear which purportedly would protect marine mammals.[12] Moreover, the program was a *condition* to the industry's incidental taking of porpoise during the *exemption* from the moratorium. 16 U.S.C. § 1371(a)(2) (1976), *amended by* 16 U.S.C. § 1371 (1982). Thereafter, the *Secretary* was authorized to waive the moratorium pursuant to regulations he deemed necessary and appropriate. *Id.*; 16 U.S.C. § 1373. Certainly, if Congress deemed the observer program a necessary condition to allowing the industry an exemption from the moratorium to ensure the protection of marine mammals, it is not unreasonable for the Secretary, in waiving the moratorium, to so condition the issuance of a permit for commercial fishing. The fact that funding for the statutory program was authorized by Congress only during the industry's two-year exemption does not indicate to us that Congress intended to *ban* the use of observer programs.

12. *See* note 6 *supra*.

Further, the expiration of the statutory observer program and the termination of the industry's exemption from the moratorium on takings imposed by the MMPA coincided with the commencement of the rulemaking authority delegated to the Secretary. 16 U.S.C. § 1371(a)(2) (1976), *amended by* 16 U.S.C. § 1371(a)(2) (1982). This suggests that Congress meant what the MMPA clearly states: The *Secretary* would have the broad authority to "determine when, to what extent, *if at all, and by what means*, it is compatable with . . . [the MMPA] to allow taking . . . of any marine mammal, . . . and to adopt suitable regulations, issue permits, and make determinations . . . permitting and governing such taking." 16 U.S.C. § 1371(a)(3)(A) (1976-1982) (emphasis added).

We believe that section 1381 of the MMPA, which expressly included an observer program, provided the Secretary with a model of Congress' view as to what was necessary to carry out the purposes of the statute.

[3] The Captains' second argument is that since the House approved a bill in May of 1977[13] that explicitly authorized the use of observer data for enforcement purposes, but the Senate did not act upon it, congressional *disapproval* must be inferred. The House Oversight Committee, however, was well aware of the continued existence of the observer program and the fact that the Senate might not act on the bill.[14] The Committee was informed that existing funds were not adequate to staff all such vessels. Committee members expressed concern that the bill, which would have authorized additional funding for the observer program to staff all vessels with a capacity of four hundred or more tons,[15] might not be acted upon by Congress. This concern stemmed from the discrepancy in numbers of porpoise mortalities reported by observed and unobserved vessels and the belief that the observer program was the only means of

13. H.R. 6970 would have amended 16 U.S.C. § 1381 to provide that an observer program for 400 ton capacity vessels should be established and maintained. The observer's responsibilities would have included determining compliance with MMPA regulations.

14. *Hearings on Reducing Porpoise Mortality and Tuna-Porpoise Oversight Before Subcomm. on Fisheries and Wildlife Conservation and the Environment of the Comm. on Merchant Marine and Fisheries*, 95th Cong., 1st Sess., 455-56, 463, 465-66 (1977) (remarks of Dr. Fox and Mr. Frank).

15. *Id.* at 4631 (colloquy between Congressman Bonker and Mr. Frank, the NOAA administrator).

obtaining accurate information.[16] We have found nothing in the 1977 or 1978 hearings of the Oversight Committee that suggests that the Committee disapproved of the collection of compliance data. When Congress amended the MMPA in 1981, it did nothing to alter the [*sic*] Secretary's power to continue the existence of the observer program. Thus, we conclude that the mere failure of the bill to be enacted does not demonstrate congressional disapproval of the observer program. *Cf. American Trucking Association v. U.S.*, 344 U.S. 298, 309 n. 10, 73 S.Ct. 307, 314 n. 10, 97 L.Ed. 337 (1952) (fact that Act as originally drafted defined commerce to include leasing but lease terminology was stricken was of no consequence to Interstate Commerce Commission's implied power to regulate leasing practices).

The Captains also contend that the observer program exceeds the Secretary's rule-making authority under the MMPA because section 1377 narrowly defines the acceptable enforcement procedures. The observer program is said to be in direct conflict with section 1377, which allows warrantless searches if there exists reasonable cause to believe a vessel is in violation of the MMPA. We disagree.

Section 1377 provides that "the Secretary shall enforce the provisions" of the MMPA, 16 U.S.C. § 1377(a). The statute provides further that its provisions concerning enforcement by arrest, search and seizure, are "in addition to any other authority conferred by law[.]" 16 U.S.C. § 1377(d). Thus, section 1377 does not limit enforcement procedures to those expressly authorized in that section. The regulation prescribing the observer program comes within the meaning of "other authority conferred by law" as used in section 1377.

CONSTITUTIONALITY OF THE REGULATION

The Captains contend that the regulation authorizes a warrantless search in violation of the fourth amendment.

[4] Whether the observer program constitutes a search is a question which is not free from doubt. This circuit has held that not every boarding of a vessel constitutes a search. *United States v. Olander*, 584 F.2d 876, 888 (9th Cir.1978) (boarding to serve process is not a search), *vacated on other grounds sub nom. Harrington v. United States*, 443

16. *Id.*

U.S. 914, 99 S.Ct. 3104, 61 L.Ed.2d 878 (1979). A search within the meaning of the fourth amendment involves governmental prying into hidden places for that which is concealed by persons exhibiting a "legitimate expectation of privacy." *See Rakas v. Illinois*, 439 U.S. 128, 143, 99 S.Ct. 421, 430, 58 L.Ed.2d 387 (1978). The regulation does not authorize an inspection of private papers, nor a search of the person, or the personal effects of the Captains or their crews. Instead, the observers must confine their observations to the fishing operations of the vessel, which occur on the open sea or on deck. Thus, the information they may gather is restricted to evidence which is in plain view. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347 at 351, 88 S.Ct. 507 at 511, 19 L.Ed.2d 576 (1967). *See United States v. Whitmire*, 595 F.2d 1303, 1312 (5th Cir.1979), (high levels of privacy might be accorded to crews living quarters on tanker that travels for months, but no crew member has legitimate claim of privacy on open deck of a fishing smack or in the hold of a cargo vessel available for hire), *cert. denied*, 448 U.S. 906, 100 S.Ct. 3048, 65 L.Ed.2d 1136 (1980).

It can be argued with equal force, however, that the observer's constant surveillance of the activities of the Captains and their crews, for a prolonged period of time, constitutes an intrusion into liberty and privacy interests, protected by the fourth amendment, by exposing "what [a person] seeks to preserve as private, even in an area accessible to the public." *Katz*, 389 U.S. at 351, 88 S.Ct. at 511.

[5] We need not pause to resolve this nice question. Even if we assume that the regulation authorizes a warrantless *search* of the operations of a fishing vessel, it is our view that the regulation requiring the presence of observers on purse seiners does not violate the fourth amendment.

The fourth amendment prohibits *un*reasonable searches and seizures. Warrantless searches may be reasonable under certain circumstances. *See, e.g., Weeks v. United States*, 232 U.S. 383, 392, 34 S.Ct. 341, 344, 58 L.Ed. 652 (1914) (search incident to a lawful arrest); *Carroll v. United States*, 267 U.S. 132, 146, 45 S.Ct. 280, 282-83, 69 L.Ed. 543 (1925) (search of vehicles based on probable cause that contraband is being carried); *South Dakota v. Opperman*, 428 U.S. 364, 367-76, 96 S.Ct. 3092, 3096-3101, 49 L.Ed.2d 1000 (1976) (inventory search of impounded vehicles without a showing of probable cause); *Illinois v. LaFayette*, ___ U.S. ___, ___, 103 S.Ct. 2605, 2611, 77 L.Ed.2d 65 (1983) (booking search of a man's purse-type shoulder bag); *United States v. Villamonte-*

Marquez, ____ U.S. ____, ____, 103 S.Ct. 2573, 2582, 77 L.Ed.2d 22 (1983) (boarding of vessels without articulable suspicion). In *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1924), the Supreme Court commented: "Under the common law and agreeably to the Constitution [a] search may in many cases be legally made without a warrant. The Constitution does not forbid search, as some parties contend, but it does forbid unreasonable search." 267 U.S. at 146, 45 S.Ct. at 282.

The Supreme Court has recognized that warrantless searches in closely regulated industries can be reasonable. The Court has held that warrantless inspections are reasonable if they are reasonably necessary to further important federal interests and the federal regulatory presence is sufficiently comprehensive and predictable that "the assurance of regularity provided by a warrant is rendered unnecessary." *Donovan v. Dewey*, 452 U.S. 594, 599-602, 101 S.Ct. 2534, 2538-40, 69 L.Ed.2d 262 (1981)." The Court has applied the exception where the business premises searched are part of an industry "long subject to close supervision and inspection." *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 76-77, 90 S.Ct. 774, 776-77, 25 L.Ed.2d 60 (1970); *see also United States v. Raub*, 637 F.2d 1205, 1208 (9th Cir.1980) ("One of the recognized exceptions to the warrant requirement is for administrative searches of enterprises that traditionally have been closely regulated."). In *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313, 98 S.Ct. 1816, 1820-21, 56 L.Ed.2d 305 (1978), the Court observed that certain industries have had such a history of close governmental supervision that no reasonable proprietor entering into them could have a justifiable expectation of privacy. In *United States v. Biswell*, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972), the Court extended the pervasively regulated industry exception to industries without a long tradition of regulation where frequent unannounced inspections are essential to further an important governmental interest.

Where the regulation involves a comprehensive and predictable governmental presence, the owner "is not left to wonder about the

17. As noted earlier, we have concluded that the observer program furthers substantial federal interests in protecting marine mammals. Congress was aware that an important national asset was being depleted by the commercial tuna fishing industry. Congress also determined that the Secretary needed broad rule-making power to adopt measures consistent with the MMPA to remedy the problem. The Secretary reasonably concluded that the observer program was necessary to further the regulatory scheme presented under the MMPA.

purposes of the inspector or the limits of his task." 406 U.S. at 316, 92 S.Ct. at 1596. The Court has also noted that where the industry is closely regulated, the owner cannot help but be aware that the government will conduct periodic inspections for specific purposes. *Donovan v. Dewey*, 452 U.S. 594, 600, 101 S.Ct. 2534, 2538-39, 69 L.Ed.2d 262 (1981). The reasonableness of a search in a closely regulated industry does not depend on the existence of probable cause but rather on the "pervasiveness and regularity of the federal regulations." 452 U.S. at 606, 101 S.Ct. at 2542. When a person chooses to engage in a closely regulated industry and to accept a license which is conditioned upon such warrantless intrusion and inspection, he does so with full knowledge of the restrictions on his privacy. He is also fee not to submit to such regulation and warrantless inspection by declining to seek a federal permit. *Biswell*, 406 U.S. at 315-16, 92 S.Ct. at 1596.

The Captains argue that the closely regulated industry exception does not apply to a warrantless administrative search unless it is expressly authorized by Congress. This argument was presented and rejected by the court in *United States v. Rucinski*, 658 F.2d 741 (10th Cir.1981), *cert. denied*, 455 U.S. 939, 102 S.Ct. 1430, 71 L.Ed.2d 649 (1982). It is quite true that in each of the cases cited above where the Supreme Court determined that a warrantless search of a closely regulated industry was reasonable under the fourth amendment, the entry was expressly authorized by statute. The Captains assume that since the Supreme Court has held that a warrantless search of a closely regulated industry is reasonable when expressly authorized by Congress, the search of such a business violates the fourth amendment if it is conducted pursuant to a regulation *impliedly* authorized by Congress. No authority is cited for this novel constitutional proposition. The law is to the contrary. Congress cannot authorize conduct which violates the fourth amendment. The proper inquiry when a warrantless search is challenged is whether it is authorized by the fourth amendment—not by an act of Congress.

In *Raub*, this court noted that "[c]ommercial fishing has a long history of being a closely regulated industry." 637 F.2d at 1208 (footnote omitted). Regulation of the fishing industry began in 1793. *Id.* at 1209 n. 5. Since 1972, the tuna industry has been closely regulated by Congress because its fishing operations threatened the extinction of the porpoise. Congress' interest in the protection of marine mammals was made known to all commercial fishermen in 1972 when Congress expressly authorized the placing of observers on purse seiners to protect the porpoise under the MMPA. As discussed above, in the MMPA, Congress

authorized the Secretary to prescribe regulations and to issue a permit restricting the taking of marine mammals. Congress also authorized the Secretary to limit the issuance of permits to those persons who can demonstrate that any taking of marine mammals will be consistent with the MMPA, 16 U.S.C. § 1373. Thus, commercial fishermen have been made aware since 1972 that to take porpoise they must have a permit which is subject to conditions that will insure that marine mammals are given the protection required by Congress. The statutory observer program had been one such condition. Since 1974 commercial fishermen have also been aware of the regulation which prescribes the observer program. Any tuna boat Captain who does not wish to expose himself to the observation of his open deck activities is free not to submit to such an intrusion by refraining from seeking a permit. *See Biswell*, 406 U.S. at 315-16, 92 S.Ct. at 1596. *See also Wyman v. James*, 400 U.S. 309, 91 S.Ct. 381, 27 L.Ed.2d 408 (1971) (a welfare recipient may avoid an entry into his home by refusing to accept public assistance).

In determining whether warrantless searches in a closely regulated industry are reasonable we must decide whether the regulatory scheme "in terms of the certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant." *Dewey*, 456 U.S. at 603, 101 S.Ct. at 2540. It is evident to us that the observer program regulation provides an adequate substitute for a warrant for several reasons.

First, the MMPA, the regulation, and the National Marine Fisheries Services' (NMFS) Manual establish a predictable and guided federal presence and limit the scope of the data collection. The MMPA delegates to the Secretary the authority to waive the moratorium on porpoise takings only when he can determine that such takings will not disadvantage protected species. The MMPA specifically sets forth permissible restrictions on the takings of porpoises and authorizes the Secretary to impose additional ones. The Act also requires publication of proposed regulations, and clearly defines its objectives and purposes.

Under the observer program, vessel owners are sent advance calendars of scheduled observer trips. This notification includes a statement of the significant regulations promulgated by the Secretary. The regulation, 50 C.F.R. § 216.24(f), limits the scope of observer activities to data collection. The National Marine Fishery Service Field Manual further defines the data collection activities of individual observers. The 1979 Manual informs observers that they are not enforcement agents and they are not

"to record extraneous comments, editorials, or personal opinions . . . or evaluate or interpret data." Observers are instructed simply to record the data called for in the form. The Manual, which is available to the industry, contains sections on the observer's responsibilities, instructions to the observers, and standardized forms to record information. The 1981 Manual additionally establishes a predeparture conference between the owner, master, observer, and an agency official to ensure a common understanding of the scope of observers' activities.

Second, the regulation requires that tuna vessel owners be given advance notice of the stationing of an observer on their vessel. Thus, the surprise element of many warrantless inspections is lacking here. *See, e.g., Delaware v. Prouse*, 440 U.S. 648, 657, 99 S.Ct. 1391, 1398, 59 L.Ed.2d 660 (1979). This advance notice also provides the Captains with an opportunity to seek judicial review of a particular scheduled observer trip. *Cf. Dewey*, 452 U.S. at 604-05, 101 S.Ct. at 2541 (opportunity for judicial review is factor important in reasonableness determination). They are also free to request a court order accommodating any privacy interests that may need protection. We conclude that the regulation as limited by the field manual provides a constitutionally adequate substitute for a warrant.

Use of observers advances the legitimate government interest of meaningful protection of the porpoise population, while the safeguards built into the observer program insure that there will be no significant intrusion on the Captains' fourth amendment interests. *Cf. Delaware v. Prouse*, 440 U.S. at 654, 99 S.Ct. at 1396 (constitutionality of a law enforcement procedure is basically tested by balancing its intrusion on fourth amendment interests against its promotion of legitimate government interests).

The Captains ask us to invalidate the observer program on the ground that a less restrictive alternative for obtaining the information exists. The government's affidavit, however, demonstrates that the suggested techniques—aerial surveillance and the like—are prohibitive in terms of cost and are ineffective in terms of data collection necessary for the Secretary to waive the moratorium on takings of porpoise and to issue permits. *Cf. Wyman*, 400 U.S. at 322, 91 S.Ct. at 388 (although secondary sources might be helpful, they would not always assure identification of information required for receipt of benefits).

In *Villamonte-Marquez*, the Court noted that the nature of water borne commerce in waters providing ready access to the open sea is sufficiently different from the nature of vehicular traffic on highways so as to make possible alternatives to the boarding of a vessel less likely to accomplish essential governmental procedures. ____ U.S. at ____, 103 S.Ct. at 2581.

CONCLUSION

We hold that the requirement that observers be permitted to board purse seiners on a scheduled basis as a condition of obtaining a permit to take porpoise is reasonable under the fourth amendment. The regulation and the field manual do not authorize the observers to conduct searches of the persons, personal effects, or living quarters of the Captains and their crews. Such a search would have to be justified independently under the fourth amendment.

The judgment in *Balelo* is reversed and remanded for further proceedings consistent with this opinion. The judgment in *Gladiator* is affirmed.

PREGERSON, Circuit Judge, concurring:

I concur in the majority's opinion but write separately to say that the observer program does not constitute a "search" within the meaning of the fourth amendment.

Fourth amendment protection operates when two conditions are met. First, a person must have exhibited an expectation of privacy in the place where the Government has allegedly intruded. Second, this expectation must be one that a free society is prepared to recognize as reasonable. *Katz v. United States*, 389 U.S. 347, 361, 88 S.Ct. 507, 516-17, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring).

The tuna boat captains have failed to meet either condition. They conduct fishing operations at sea on decks covered only by the sky and open to view by other crew members, nearby vessels, and overflying aircraft.

Moreover, our society is not prepared to recognize an expectation of privacy on open tuna boat decks, which are really no different from work areas in any industry the Government regulates to safeguard the public

health and welfare. Federal inspectors, without impinging on any reasonable expectation of privacy, routinely monitor work areas in the coal mining, *Donovan v. Dewey*, 452 U.S. 594, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981) (Federal Mine Safety and Health Act of 1977), firearms, *United States v. Biswell*, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972) (Gun Control Act of 1968), and salmon fishing, *United States v. Raub*, 637 F.2d 1205 (9th Cir.1980) (Sockeye Salmon Fishing Act of 1947), industries, to name just a few.

In the final analysis, I think the question whether a governmental intrusion into a private area constitutes a reasonable search under the fourth amendment depends on the kind and degree of intrusion that a free society is willing to tolerate. *United States v. Solis*, 393 F.Supp. 325, 328 (C.D.Cal.1975) (Pregerson, J.), *aff'd in relevant part*, 536 F.2d 880 (9th Cir.1976). With few exceptions, our society does not tolerate warrantless intrusions into private dwellings and offices. *E.g., Camara v. Municipal Court*, 387 U.S. 523, 528-29, 87 S.Ct. 1727, 1730-31, 18 L.Ed.2d 930 (1967). But the presence on open decks of government scientists monitoring commercial fishing operations to save the porpoise from extinction is the kind and degree of intrusion that our society should tolerate.

NELSON, Circuit Judge, concurring:

If hard cases make bad law, I fear the result of cases such as this. I write specially to reveal the extraordinary difficulties I find in this case, and to explain its limited applicability.

First, I would make explicit that the search involved here is overwhelmingly intrusive. Stationing an observer on a small boat for months at a time is both a search and a massive invasion of privacy. Thus, when I balance the need for government regulation with the degree of intrusion in this case, I find both sides of the scale weighted heavily. I would not simply "assume *arguendo*" that this is a search, but would call it by its name and treat it accordingly.

Warrantless searches are presumptively unreasonable. *See, e.g., Camara v. Municipal Court*, 387 U.S. 523, 528-29, 87 S.Ct. 1727, 1730-31, 18 L.Ed.2d 930 (1967). The pervasively regulated industry exception is narrowly crafted, and should be limited as much as possible. *See See v. City of Seattle*, 387 U.S. 541, 543, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967). It is only because I view a commercial fishing vessel to be a

workplace (unlike, say, a house boat or a recreational boat) that I am willing to apply the exception here. Even then, however, I am wary of permitting warrantless searches of residences that double as workplaces. But for the unique inaccessibility of ships at sea, I would not permit a warrantless search. *See United States v. Villamonte-Marquez*, ____ U.S. ____, 103 S.Ct. 2573, 77 L.Ed.2d 22 (1983).

Second, I write to emphasize the magnitude of the governmental interest involved in this case. If the world loses genetic diversity, it has truly suffered irreparable harm. Marine mammals have long been threatened by the onslaught of technology; if we must take drastic steps to avoid further encroachment, so be it.

Last, I am struck by the precautions the government has taken to limit the intrusiveness of the observer program. The regulatory scheme is detailed; the inspectors can report about porpoises and nothing more; absolutely no alternative method of enforcement exists. Under these circumstances, I hesitantly concur. Were the situation less compelling in any respect, I would not.

TANG, Circuit Judge, with whom FERGUSON, Circuit Judge, joins, and with whom CANBY, Circuit Judge, joins in Part II, dissenting:

I respectfully dissent. In my view the challenged regulation is not authorized by Congress and the provision for warrantless searches offends the Constitution.

I

The regulation, 50 C.F.R. § 216.24(f), establishes an indefinite policy of stationing federal observers aboard tuna boats for enforcement as well as research purposes. Because Congress expressly restricted the use of observers to the two-year period following passage of the Act and limited the function of such officials to research and scientific observation, this regulation goes far beyond the design of the statute it purports to implement.

Regulations promulgated pursuant to an enabling statute will be upheld if they are reasonably related to the purposes of the enabling legislation, *Mourning v. Family Publication Service, Inc.*, 411 U.S. 356, 369, 93 S.Ct. 1652, 1660, 36 L.Ed.2d 318 (1973), but such regulations

will not be sustained when they are contrary to congressional design. "The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is 'the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'" *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14, 96 S.Ct. 1375, 1391, 47 L.Ed.2d 668 (1976) (quoting *Manhattan General Equipment co. v. Commissioner*, 297 U.S. 129, 134, 56 S.Ct. 397, 400, 80 L.Ed. 528 (1936)). Thus, "our primary task when testing the statutory authority of a challenged regulation must always be to determine the intent of Congress." *State of California v. Block*, 663 F.2d 855, 860 (9th Cir.1981).

In this case, the language of the statute and its legislative history both indicate that Congress intended to restrict the use of on-board observers to the two-year period following passage of the Act.

16 U.S.C. § 1381 provided:

> [a]fter timely notice and *during the period of research provided in this section*, duly authorized agents of the Secretary are hereby empowered to board and to accompany any commercial fishing vessel . . . on a regular fishing trip for the purpose of conducting research or observing operations in regard to the development of improved fishing methods and gear as authorized by this section. 16 U.S.C. § 1381(d) (1976). (emphasis added)

The period of research referred to in § 1381(d) covered "the full twenty-four calendar month period following October 21, 1972," after which the results of such research were to be reported to Congress. 16 U.S.C. § 1381(a). Funding for the observer program was also limited to the two-year period provided in the statute. The statutory objective was to use the observers as part of "a program of research and development for the purpose of devising improved fishing methods and gear so as to reduce to the maximum extent practicable the incidental taking of marine mammals in connection with commercial fishing." 16 U.S.C. § 1381(a). Congress clearly expressed its intent to use the observers only as part of a short term research program. The majority, however, sanctions the agency's administrative decision to transform one part of a limited research program into an ongoing regulatory policy of indefinite duration.

The legislative history of the observer program underscores the two-year limitation as part of the Act's congressional design. Section 1381 of the Act originated as a Senate amendment. The Senate report indicates that Congress intended the observer research and development program to terminate two years after passage of the Act. The majority is simply incorrect when it suggests that the observer program was merely a model after which a regulatory observer policy could be patterned. "The committee has authorized a $2 million, 2-year program to devise new methods of netting and tuna boat operating procedures which will reduce the killing of marine mammals. The committee has provided a 2-year period because it is believed that science can come up with new systems within that time." S.Rep. No. 863, 92nd Cong., 2d Sess. 9-10 (1972). At the end of the two-year period, the best available fishing methods, if feasible, were to be mandated on commercial fishing vessels, S.Rep., *supra* at 21. The research program, including its $2 million appropriation and federal observer component, was restricted to a two-year period in clear and explicit terms. Neither the statutory language nor the legislative history of the observer program hint that the agency retained any discretion to extend the use of on-board observers beyond the explicit two-year period.

In addition to its unauthorized extension of the operative period for the observer program, the regulation also expands the function of the government observers beyond the research component contemplated by Congress by enlisting them as inspection and enforcement officials. When Congress created the two-year observer program, it expressly stated that the observer presence was a research tool aimed at "the development of improved fishing methods and gear as authorized by this section." 16 U.S.C. § 1381(d). The regulation, however, extends the duration of the observer presence indefinitely and transforms the observers from mere researchers into enforcement officers who collect information for use against the fishermen in civil and criminal actions. To label them now merely "observers" is an understatement. They are now federal inspectors who maintain constant surveillance to ensure that fishermen comply with federal law. The majority is correct to say this is probably the most efficient way to guarantee that the fishermen fish by the rules, but it is not what Congress provided. The observer program was not developed in a spirit of expediency. If Congress contemplated the use of live-in observers for enforcement purposes, it could have expressly provided for such a function in the observer statute or at least granted the Secretary the discretion to create additional functions for the observers.

Instead, Congress specifically addressed the methods of enforcing the statutory scheme in § 1377 of the Act, which allows warrantless searches of vessels only if there is "reasonable cause to believe" that a vessel or crew member is violating the Act or its regulations. 16 U.S.C. § 1377(d).[1] Hence, the very structure of the Act itself—indeed its own language—indicates that Congress did not envision warrantless searches by on-board observers as an enforcement mechanism. The majority, however, seizes on that part of the language of § 1377 which suggests that the enforcement measures it authorizes are "in addition to any other authority conferred by law." 16 U.S.C. § 1377(d). The majority asserts that this language indicates that Congress vested the Secretary with the power to create additional enforcement measures even in contravention of the express statutory limitations of § 1377. Under the majority's reading of the statute, the Secretary, apparently without limitation, may abrogate the explicit search and seizure restrictions of § 1377 and effectively render most of that section a nullity. Beyond the fact that neither the plain language of the statute nor its legislative history substantiates such an interpretation, the majority's reading defies basic principles of statutory construction because "acceptance of that meaning would lead to absurd results . . . or would thwart the obvious purpose of the statute." *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643, 98 S.Ct. 2053, 2061, 56 L.Ed.2d 591 (1978) (*quoting Commissioner v. Brown*, 380 U.S. 563, 571, 85 S.Ct. 1162, 1166, 14 L.Ed.2d 75 (1965)). This self-emasculating inter-

1. Execution of process; arrest; search; seizure

(d) Any person authorized by the Secretary to enforce this subchapter may execute any warrant or process issued by any officer or court of competent jurisdiction for the enforcement of this subchapter. Such person so authorized may, in addition to any other authority conferred by law—

(1) with or without warrant or other process, arrest any person committing in his presence or view a violation of this subchapter or the regulations issued thereunder;

(2) with a warrant or other process, or without a warrant if he has reasonable cause to believe that a vessel or other conveyance subject to the jurisdiction of the United States or any person on board is in violation of any provision of this subchapter or the regulations issued thereunder, search such vessel or conveyance and arrest such person;

(3) seize the cargo of any vessel or other conveyance subject to the jurisdiction of the United States used or employed contrary to the provision of this subchapter or the regulations issued hereunder or which reasonably appears to have been so used or employed; and

(4) seize, whenever and wherever found, all marine mammals and marine mammal products taken or retained in violation of this subchapter or the regulations issued thereunder and shall dispose of them in accordance with regulations prescribed by the Secretary.

16 U.S.C. 1377(d).

pretation of § 1377 is contrary to the presumption against reading a statute in a manner which renders it ineffective. *F.T.C. v. Manager, Retail Credit Co.*, 515 F.2d 988, 995 (D.C.Cir.1975). The majority's reading of § 1377 exaggerates the language of a single phrase to eviscerate the statute's internal enforcement scheme, a scheme that was designed to enforce the Act without disregarding the privacy concerns of those who would be subject to it.

The majority suggests that subsequent congressional inaction infers approval of the way observers are used under the regulation. Such inaction is not a helpful indicator of congressional intent when the statutory language itself suggests a contrary interpretation. *S.E.C. v. Sloan*, 436 U.S. 103, 117, 98 S.Ct. 1702, 1711, 56 L.Ed.2d 148 (1978). When Congress has squarely faced the propriety of a regulatory measure, congressional non-action may be evidence of congressional approval. *Bob Jones University v. United States*, ____ U.S. ____, 103 S.Ct. 2017, 2033, 76 L.Ed.2d 157 (1983). Absent such direct consideration, however, "[n]onaction by Congress is not often a useful guide. . ." *Bob Jones University, supra*, at 2033.

The majority attempts to bolster its finding of congressional approval by noting that Congress has amended the Act without disturbing the Secretary's use of on-board observers. This argument is unpersuasive because the on-board observer program was not specifically addressed in subsequent legislative action. Indeed, the Supreme Court recently rejected such an argument in *Aaron v. S.E.C.*, 446 U.S. 680, 100 S.Ct. 1945, 64 L.Ed.2d 611 (1980). There, the Court refused to adopt an agency's statutory interpretation which was premised on congressional failure to disturb that interpretation in subsequent legislative amendments to the authorizing act. "[S]ince the legislative consideration of those statutes was addressed principally to matters other than that at issue here, it is our view that the failure of Congress to overturn the Commission's interpretation falls far short of providing a basis to support a construction of § 10(b) so clearly at odds with its plain meaning and legislative history." *Id.* at 694, n. 11, 100 S.Ct. at 1954, n. 11.

Because the plain language of § 1381 and its legislative history demonstrate that the on-board observer program was limited to research duties during the two-year period following passage of the Act, the Secretary's regulation adopting an indefinite policy of on-board observers for enforcement purposes as well as research is unauthorized.

II

The absence of statutory authorization, however, is only one basis for finding this regulation invalid. The regulation also offends the Constitution because it empowers federal inspectors to conduct searches in violation of the fourth amendment.

The majority, in its discussion of the regulation's fourth amendment impact, side-steps and fails to confront the threshold question of whether the intrusiveness of stationing government observers on private fishing vessels for extended periods constitutes a search. The majority suggests that the observer policy may not constitute a search within the meaning of the fourth amendment because the government officials confine their observations to the open deck or open sea. This understates the actual operation of the observers. They are more than mere passive onlookers; they are uninvited government inspectors who live with the crew for weeks at sea, watching all aspects of fishing operations, conducting research and collecting data and information that may be used against the tuna fishermen in civil and criminal proceedings. This is not "a brief detention where officials come on board, visit public areas of the vessel, and inspect documents." *United States v. Villamonte-Marquez*, ___ U.S. ___, 103 S.Ct. 2573, 2581, 77 L.Ed.2d 22 (1983). This regulation places live-in government inspectors on private vessels for surveillance purposes over a period of months and results in the type of governmental invasion that is well within the protection of the fourth amendment. Despite the majority's ambivalence on this issue, the use of government inspectors under the regulation is a search within the meaning of the fourth amendment. As such, it is presumptively unconstitutional in the absence of a warrant, and "[t]he burden is on the government to prove that the departure from the warrant requirement was justified." *United States v. Martin*, 693 F.2d 77, 78 (9th Cir. 1982) (per curiam); *Coolidge v. New Hampshire*, 403 U.S. 443, 455, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564 (1971).

The majority decides, however, that even if this use of observers constitutes a search, it is reasonable because it falls within the pervasively regulated industry exception to the warrant requirement. The majority suggests that because the tuna fishing industry has been subject to government regulation, the acceptance of federal observers must be part of the regulatory burden that goes with the benefit of tuna fishing. The majority ventures into uncharted territory, however, because the Supreme Court has admonished that the regulated industry exception is a

narrow one, one that neither the Supreme Court nor this court has ever embraced in the absence of explicit statutory authorization for the warrantless search scheme it purports to justify. Moreover, the regulated industry exception has never been used to justify warrantless surveillance schemes such as the one in this case. Until now, the exception has only applied to warrantless inspections of particular businesses on a periodic basis. The majority breaks new ground by applying the exception to warrantless surveillance schemes conducted for days and months at a time.

In regulated industry cases, warrantless searches are still presumptively unreasonable and the government retains the burden of justifying its disregard for the warrant requirement. *Marshall v. Barlow's Inc.*, 436 U.S. 307, 312-13, 98 S.Ct. 1816, 1820-21, 56 L.Ed.2d 305 (1978). "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." *Id.*, at 312, 98 S.Ct. at 1820 (quoting *See v. Seattle*, 387 U.S. 541, 543, 87 S.Ct. 1737, 1739, 18 L.Ed.2d 943 (1967)). In this case, the government has failed to meet its burden of justifying the warrantless intrusions which the challenged regulation authorizes.

Under the pervasively regulated industry exception, a warrant may not be required "when Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." *Donovan v. Dewey*, 452 U.S. 594, 600, 101 S.Ct. 2534, 2539, 69 L.Ed.2d 262 (1981). While planting government observers on fishing vessels for the duration of the expeditions may offer the most efficient method of policing the Act, enthusiasm for this enforcement technique should not obscure the essential constitutional requirement that the warrantless quality of such a procedure must be vital to the regulatory scheme. The government has not proffered any convincing explanation why waiver of the warrant requirement is essential to the enforcement of the Act or to the effective implementation of the observer program.

In *Donovan v. Dewey*, 452 U.S. 594, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981), the Supreme Court upheld a warrantless search scheme under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 813(a) (1976). The statute allowed federal mine inspectors to make unannounced inspections of underground mines four times a year and surface mines

twice a year. The Court noted that a warrant requirement could frustrate such an inspection scheme because unannounced inspections were needed to effectuate the scheme's objective of deterring hazardous mine conditions. *Id.* at 603, 101 S.Ct. at 2540. In *United States v. Kaiyo Maru No. 53*, 699 F.2d 989 (9th Cir.1983), this court upheld a warrantless search scheme designed to enforce the Fishery Conservation and Management Act. 16 U.S.C. § 1861(b). The court concluded that dispensing with the warrant requirement for Coast Guard inspections of fishing boats in the Fishery Conservation Zone was necessary due to the logistical barriers of obtaining a warrant for ships at sea. *Id.* at 995.

A comparable element of necessity is missing in this case. The regulation authorizes boarding by federal observers at the time of departure and provides for notification of the observer presence several days before the expedition begins. After they are aboard, the observers make their observations and inspections throughout the duration of the fishing trip. Nothing in this procedure indicates that a warrant requirement would frustrate the objectives of the regulatory search scheme. Research and observation activities under the regulatory procedure can be conducted in the same manner whether or not a warrant is obtained. Although a warrant requirement in this case might be an administrative annoyance, the inconvenience it poses is an insufficient basis to "vitiate the general constitutional requirement that for a search to be reasonable a warrant must be obtained." *Marshall*, 436 U.S. at 324, 98 S.Ct. at 1827. Moreover, a warrant requirement pursuant to a regulatory search scheme need not be based on evidence of specific violations or actions on particular boats. A warrant requirement in this context would be designed to ensure governmental compliance with reasonable legislative and regulatory standards for the frequency and scope of the search operation. *Id.* at 320, 98 S.Ct. at 1824; *Camara v. Municipal Court*, 387 U.S. 523, 538, 87 S.Ct. 1727, 1735-36, 18 L.Ed.2d 930 (1967). Such a requirement preserves the historic function of checking the potential for arbitrary government conduct without frustrating the legitimate objectives of the Marine Mammal Protection Act. This balance is especially important as virtually all guidelines regarding the conduct of the observer operation emanate from internal agency policies instead of statutory or regulatory guidelines with force of law.

As the reasonableness of a regulatory search scheme "depends on the specific enforcement needs and privacy guarantees of each statute," *Kaiyo Maru No. 53*, 699 F.2d at 995, and as the burden of demonstrating the need to by-pass the warrant requirement rests with the government, the absence of any persuasive proof that warrantless searches are

necessary calls for adherence to the general rule instead of the exception. A warrant is required for this regulatory search scheme.

III

Because 50 C.F.R. § 216.24(f) exceeds congressional authorization and establishes a search scheme in violation of the fourth amendment of the Constitution, I dissent.

FERGUSON, Circuit Judge, dissenting:

Today the majority installs a federal agent in the temporary home of 14 to 18 fishermen for a two- to three-month period without requiring a warrant or a showing of probable cause to believe that the law has been broken. The fourth amendment assuring that the people are to be secure in their homes, mandates that warrantless government intrusion into even a temporary home is *per se* unreasonable. This protection is not lost because the place called home is also used for commercial purposes, i.e. as a fishing vessel, for both commercial premises and seafaring vessels are covered by the fourth amendment.

The National Oceanic and Atmospheric Administration (NOAA), an agency of the federal government, has by regulation placed federal agents on board tuna fishing vessels for two- to three-month fishing trips by conditioning the license to fish for tuna upon the vessel owner's consent to the presence of federal observers. 50 C.F.R. § 216.24(f) (1982). The federal "observers" are authorized to conduct research and collect information "which may be used in civil or criminal penalty proceedings, forfeiture actions, or permit or certificate sanctions." *id.* § 216.24(f)(1), while they live for the extended fishing trip on a 150- to 250-foot boat with the crew of 14-18 men. M.K. Orbach, *Hunters, Seamen, and Entrepreneurs* (1977) (hereinafter "Orbach"). It has been stipulated by the parties that the observers take their meals with the fishermen, are not confined to any particular areas of the vessel, and are expected to "maintain open communication" with and question vessel operators and other personnel while recording data pertaining to the enforcement of the Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1407.

Any possibility of separating the business aspects of a fishing vessel from the home aspects is belied by the realities of life on such a vessel:

> [I]t is impossible to get more than about 50 feet from any of the other 15 men with whom you are going to spend the next two months. You can draw curtains or close doors and remain out of sight a good part of the time, but you can never get *away* from them, and the fishing process forces you into regular interaction with them.

Orbach at 25 (emphasis in original). Both Congress and the Supreme Court have acted to specially protect the rights and comforts of seamen due to this unusual characteristic of their work. *See Aguilar v. Standard Oil Co.*, 318 U.S. 724, 732, 63 S.Ct. 930, 934-35, 87 L.Ed. 1107 (1943) ("Of necessity, during the voyage [the seaman] must eat, drink, lodge and divert himself within the confines of the ship. In short, during the period of his tenure the vessel is not merely his place of employment; it is the framework of his existence."); *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 782, 72 S.Ct. 1011, 1014, 96 L.Ed. 1294 (1952); *Warner v. Goltra*, 293 U.S. 155, 162, 55 S.Ct. 46, 49, 79 L.Ed. 254 (1934), ("[T]he maritime law by inveterate tradition has made the ordinary seaman a member of a favored class.").

The NOAA's effort to install a federal agent on board a fishing vessel without securing a warrant based on probable cause is reminiscent of the "indiscriminate searches and seizures conducted under the authority of 'general warrants' [which] were the immediate evils that motivated the framing and adoption of the Fourth Amendment." *Payton v. New York*, 445 U.S. 573, 583, 100 S.Ct. 1371, 1378, 63 L.Ed.2d 639 (1980); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311, 98 S.Ct. 1816, 1819-20, 56 L.Ed.2d 305 (1978). The fourth amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects. . . ." The Supreme Court has defined the scope of the fourth amendment to include a person's "reasonable expectation of privacy." *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Such a definition extends fourth amendment protections beyond the literal meaning of "houses" to temporary residences, such as a hotel, *Stoner v. California*, 376 U.S. 483, 490, 84 S.Ct. 889, 893, 11 L.Ed.2d 856 (1964), a rooming house, *McDonald v. United States*, 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153 (1948), and even a mobile home, *People v. Carney*, 34 Cal.3d 597, 194 Cal.Rptr. 500, 668 P.2d 807 (1983) and to commercial premises, *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 329, 99 S.Ct. 2319, 2326, 60 L.Ed.2d 920 (1979) (adult bookstore); *Mancusi v. DeForte*, 392 U.S.364, 367, 88 S.Ct. 2120, 2123, 20 L.Ed.2d 1154 (1968) (office); *See v. City of Seattle*, 387 U.S. 541, 543, 87 S.Ct. 1737, 1739, 18 L.Ed.2d 943 (1967) (warehouse), as well as to seafaring vessels, *United States v. Villamonte-*

Marquez, ____ U.S. ____, 103 S.Ct. 2573, 2581, 77 L.Ed.2d 22 (1983), and automobiles, *Delaware v. Prouse*, 440 U.S. 648, 662-63, 99 S.Ct. 1391, 1400-01, 59 L.Ed.2d 660 (1979). More important, the "Fourth Amendment protects people, not places," *Katz v. United States*, 389 U.S. at 351, 88 S.Ct. at 511, and thus prohibits warrantless surveillance of a person's ordinarily private actions and words. *Id; United States v. United States District Court*, 407 U.S. 297, 313, 92 S.Ct. 2125, 2134-35, 32 L.Ed.2d 752 (1972). As the Court stated over twenty years ago:

> At the very core [of the fourth amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion. This Court has never held that a federal officer may without warrant and without consent physically entrench into a man's office or home, there secretly observe or listen, and relate at the man's subsequent criminal trial what was seen or heard.

Silverman v. United States, 365 U.S. 505, 511-12, 81 S.Ct. 679, 683, 5 L.Ed.2d 734 (1961) (citations omitted). It is precisely this "right to be let alone," *Olmstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting), that is trampled when tuna fishermen are required to live, eat, sleep, lodge and relax in the presence of a federal agent within the confines of a 150- to 250-foot boat in the middle of the ocean for two to three months at a time.

The fourth amendment provides that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . particularly describing the place to be searched, and the persons or things to be seized." A warrantless search is presumptively unreasonable. *Payton v. New York*, 445 U.S. at 586 n. 25, 100 S.Ct. at 1380 n. 25; *Marshall v. Barlow's, Inc.*, 436 U.S. at 312, 98 S.Ct. at 1820; *United States v. United States District Court, supra*. If the reasonableness of a search could be based "on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests . . . Fourth amendment protection in this area would approach the evaporation point." *Chimel v. California*, 395 U.S. 752, 764-65, 89 S.Ct. 2034, 2041, 23 L.Ed.2d 685 (1969). Rather, "a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant" or falls within one of carefully defined exceptions to the warrant requirement. *Camara v. Municipal Court*, 387 U.S. 523, 528-29, 87 S.Ct. 1727, 1730-31, 18 L.Ed.2d 930 (1967). This rule must be strictly enforced as "[t]he right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a

society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." *Id.* at 529, 87 S.Ct. at 1731 (quoting *Johnson v. United States*, 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948)). As shown by Judge Tang in his dissent, the regulation at issue here cannot be justified under any of the recognized exceptions to the warrant requirement, particularly the "pervasively regulated industry" exception.

Tuna fishermen do not waive their right to be free from unreasonable search or surveillance by temporarily living onboard a fishing vessel. The fishing boat is not just their place of employment, but for two to three months it is "the framework of [their] existence," *Aguilar v. Standard Oil Co.*, 318 U.S. at 732, 63 S.Ct. at 934, and their home. This home cannot be entered by law enforcement officers absent a warrant based on probable cause to believe that a crime has been or is being committed. It is well established that an administrative regulation which by its terms violates the fourth amendment is unconstitutional and should not be enforced. *Marshall v. Barlow's, Inc., supra.*

The majority states that it is necessary to place federal observers aboard tuna fishing vessels to protect the lives of porpoises. Maj.op., at 760, 761. However, it fails to address the question whether a warrant authorizing the placement of such observers on a case-by-case basis would undercut the objectives of the Marine Mammal Protection Act. Clearly, if a warrant is required under the Marine Mammal Protection Act, those on the fishing vessel upon which an observer may be stationed could conceal no more than they could conceal with the federal agent forced aboard without the prophylatic protections of a warrant issued by a neutral officer. *See Marshall v. Barlow's, Inc.*, 436 U.S. at 323, 98 S.Ct. at 1826. Moreover, the regulation by its own terms undermines the argument that notice would frustrate the objectives of the observer program as it provides that the fishing vessel owner receive notice of the placement of an "observer" five days prior to the voyage. 50 C.F.R. § 216.24(f)(4). Contrary to the majority position (maj.op., at 765), mere knowledge of the existence of a regulatory purpose cannot eliminate one's expectation of privacy, for that would consume the rule against warrantless searches in the exception. *Cf. Michigan v. Tyler*, 436 U.S. 499, 508, 98 S.Ct. 1942, 1949, 56 L.Ed.2d 486 (1978).

The majority states that the warrantless quartering of a federal agent on a 30-60 day fishing trip is so clearly limited by regulation that the regulation is the substantial equivalent of a warrant. Maj.op. at 765-766. However, it has been recognized that when law enforcement officers are lawfully on the premises for limited purposes, the restrictions placed on the scope of their search or duties "may be more theoretical than real." *Payton v. New York*, 445 U.S. at 589, 100 S.Ct. at 1381. Moreover, the majority's position that the observer may legitimately gather evidence in "plain view" on the ship belies the weight of the limitations placed on the observer by the regulations. Maj.op., at 763. The fishermen are placed in the position of hiding their everyday acts and comments from the federal agent in order to establish and protect their fundamental right to be let alone. *See Illinois v. Andreas*, ___ U.S. ___, 103 S.Ct. 3319, 3327, 77 L.Ed.2d 1003 (1983) (Brennan, J., dissenting). The NOAA has made the price of being a tuna fisherman include the "dread of subjection to an unchecked surveillance power." *United States v. United States District Court*, 407 U.S. at 314, 92 S.Ct. at 2135.

The fourth amendment was a response to the general warrant whereby an officer was authorized to search private premises without evidence of unlawful activity. *Marshall v. Barlow's, Inc.*, 436 U.S. at 311, 98 S.Ct. at 1819-20. Today the majority holds that a federal agent cannot only search a private vessel, but collect data, question fishermen, and live on the vessel for months at a time without the need to secure a warrant based on a legitimate suspicion of unlawful activity. The regulation at issue here can subject "even the most law-abiding citizen" to unprecedented and unjustified government intrusion and surveillance. *See Camara v. Municipal Court*, 387 U.S. at 530, 87 S.Ct. at 1731. Surely the lives of porpoises cannot be more sacred to us than the right to privacy and freedom from government intrusion protected by the fourth amendment.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN R. BALELO, et al.,

Plaintiffs-Appellees,

-vs-

MALCOLM BALDRIDGE,* Secretary of Commerce of the United States, et al.,

Defendants-Appellants.

No. 81-5806

D.C. No. CV 80-1646 GT (H)

JOHN R. BALELO, et al.,

Plaintiffs-Appellees,

-vs-

MALCOLM BALDRIDGE,* Secretary etc.,

Defendants,

and

ENVIRONMENTAL DEFENSE FUND, INC. and DEFENDERS OF WILDLIFE, INC.,

Intervenors-Defendants-Appellants.

No. 81-5807

OPINION

Appeal from the United States District Court
for the Southern District of California
Gordon Thompson, Jr., District Judge, Presiding
Argued and Submitted August 4, 1982

BEFORE: ELY, GOODWIN, and WALLACE, Circuit Judges.

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* We substitute Malcolm Baldridge, the Secretary of Commerce, as successor to the original appellant Philip M. Klutznick, the former Secretary, pursuant to Fed. R. App. P. 43(c).

WALLACE, Circuit Judge:

Balelo and other tuna boat captains (the captains) brought this action seeking a declaration that 50 C.F.R. § 216.24(f), promulgated by the Secretary of Commerce (the Secretary), is invalid because it requires the captains to allow government observers on board their ships to qualify for permits allowing the incidental taking of porpoises during tuna fishing. The captains also seek to enjoin the Secretary's conditioning of permits on acquiescence to the observer program and the use of any observer-gathered data or its fruits in civil, criminal, and administrative proceedings.

The district court held that the regulation is invalid insofar as it permits the use of observers to gather information for purposes other than scientific research and enjoined the Secretary's use of the information in civil and criminal penalty proceedings or as grounds for administrative sanctions. The district court also enjoined the Secretary's conditioning the grant of porpoise-taking permits upon acceptance of on-board observers who might collect information to be used for non-scientific purposes. The Secretary did not challenge the district court's order except by arguing that the regulation is valid. We therefore found it unnecessary, with one exception, to express any opinion on whether the scope of the relief granted was appropriate. We affirm in part, reverse in part and remand.

I

The facts of this case are detailed in the district court's opinion, 519 F. Supp. 573 (S.D. Cal. 1981). Briefly, tuna, especially yellowfin, tend to swim in association with certain species of porpoise. Capitalizing on this known, but scientifically unexplained phenomenon, tuna fishermen often set their nets around schools of porpoise to capture the tuna swimming beneath. When the nets are pursed, porpoises as well as tuna often are caught; the porpoises, air-breathing mammals, sometimes are drowned or injured.

In 1972 Congress enacted the Marine Mammal Protection Act, 16 U.S.C. §§ 1361-407 (the Act). The Act imposed a moratorium on the taking of marine mammals, but permitted takings incidental to commercial fishing during a two-year period. *Id.* § 1371. The Act permitted authorized observers to board commercial fishing vessels during the two-year period, after notice, for purposes of research and observation. *Id.* § 1381(d). In 1974, both the statutory research observation program and

the commercial fishing exemption expired. Commercial fishermen now are allowed to take marine mammals incidentally during fishing operations only under permits issued subject to the Secretary's regulations. The Act provides severe civil and criminal penalties for violations of its provisions or of the regulations and permits issued by the Secretary. Fines not to exceed $10,000 or $20,000 per violation, imprisonment for not more than one year per violation, and forfeiture of the violator's cargo may be imposed. *Id.* §§ 1375-76.

The captains specifically challenge the validity of 50 C.F.R. § 216.24(f)(1), which provides:

> The vessel certificate holder of any certificated vessel shall, upon the proper notification by the National Marine Fisheries Service, allow an observer duly authorized by the Secretary to accompany the vessel on any or all regular fishing trips for the purpose of conducting research and observing operations, including collecting information which may be used in civil or criminal penalty proceedings, forfeiture actions, or permit or certificate sanctions.

The captains argue that the regulation subjects them to a search that is neither statutorily authorized nor constitutionally permissible. The Secretary argues that the regulation is authorized by section 103 of the Act, 16 U.S.C. § 1373, which empowers the Secretary to:

> prescribe such regulations with respect to the taking . . . of animals from each species of marine mammal . . . as he deems necessary and appropriate to insure that such taking will not be to the disadvantage of those species and population stocks and will be consistent with the purposes and policies [of this Act].

The Secretary further argues that an observer's presence on the ship does not constitute a search. Alternatively, the Secretary argues that even if stationing an observer aboard constitutes a search, the search is constitutionally permissible under the pervasively-regulated industry exception established by *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), and *United States v. Biswell*, 406 U.S. 311 (1972), and most recently applied by the Supreme Court in *Donovan v. Dewey*, 452 U.S. 594 (1981).

II

The first question we address is whether stationing an observer aboard a tuna boat constitutes a search. We agree with the district judge's conclusion that it does. Although not every boarding constitutes a search, *see United States v. Olander*, 584 F.2d 876, 888 (9th Cir. 1978) (boarding to serve process), *vacated on other grounds sub nom. Harrington v. United States*, 443 U.S. 914 (1979), boarding of a vessel for any type of investigation or inspection is a search within the scope of the fourth amendment. *United States v. Raub*, 637 F.2d 1205, 1208 (9th Cir.), *cert. denied*, 449 U.S. 922 (1980). The boarding and stationing of government agents on tuna boats, as mandated by the regulation, subjects the captain and crew at the very least to an inspection of their fishing operations. Whether the government intends to use the information it gathers for scientific research alone or in criminal and civil proceedings, the inspection falls within the fourth amendment.

This result is consistent with the rationale of *Katz v. United States*, 389 U.S. 347 (1967), where the Supreme Court held that a violation of an individual's "legitimate expectation of privacy," *see Rakas v. Illinois*, 439 U.S. 128, 143 (1978), constitutes a fourth amendment search. Commercial fishermen often operate in isolated areas of the ocean. Although their operations are in areas accessible to law enforcement officers and to the public, giving them no reasonable expectation of absolute privacy, we conclude that they could reasonably expect a greater amount of privacy than that available in the presence of uninvited on-board observers.

The Secretary argues that the "plain view" doctrine applies because the fishing operations occur in waters accessible to the public. Under the "plain view" doctrine, an officer whose presence at a certain location is legal may observe his surroundings without violating the fourth amendment. *See Colorado v. Bannister*, 449 U.S. 1, 4 & n.4 (1980) (per curiam); *Harris v. United States*, 390 U.S. 234, 236 (1968); *United States v. Wheeler*, 641 F.2d 1321, 1324-25 (9th Cir. 1981). The Secretary argues that because government agents could be present legally in the vicinity of any tuna boat by use of an airplane or another vessel and could observe legally the fishing operations in "plain view," he is simply procuring information in a more efficient way.

The Secretary's argument distorts the "plain view" doctrine. The protections of the fourth amendment are not abrogated simply because information is otherwise legally accessible. Information legally accessible

should be legally procured. If it is so procured, no violation of the fourth amendment occurs. If, however, it is procured via an unreasonable search, a fourth amendment violation occurs. *See Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 329 (1979) (retail store inviting the pubic to enter consents only to examination of merchandise in the manner used by the ordinary customer). The plain view doctrine comes into play when a government officer is legally present and then observes something in plain view. *See, e.g., Colorado v. Bannister, supra; Harris v. United States, supra*. Here, the government attempts to use its police powers to require mandatory observer presence on the fishing vessel and then to allow the observer to report what he saw. This avenue of access to information about the vessel's fishing operations is not accessible to the public; the information which might be procured by on-board observers does not fall under the plain view doctrine.

III

Holding that the plain view doctrine does not apply and that the forced presence of an on-board observer constitutes a search under the fourth amendment is only our first step. Our next inquiry does not require us to go so far as to determine whether there was a constitutional violation. In this case, we need only determine if the observer program raises substantial constitutional questions. When agency action raises issues of "questionable constitutionality," *see Greene v. McElroy*, 360 U.S. 474, 506-08 (1959), the statutory authorization for that action must be clear. We conclude that there is no clear statutory authorization for the observer program and therefore hold that promulgation of the regulations establishing the program was outside the power granted the Secretary.

Although courts ordinarily give deference to agency interpretations of the statutes they are charged to enforce, *see New York State Department of Social Services v. Dublino*, 413 U.S. 405, 421 (1973); *Adams v. Howerton*, 673 f.2d 1036, 1040 (9th Cir.), *cert. denied*, 102 S. Ct. 3494 (1982), such deference is inappropriate when an agency interprets its general enabling legislation to permit actions of doubtful constitutionality. In *Greene v. McElroy, supra*, the Supreme Court held that absent explicit presidential or congressional authorization, an agency could not deprive a federal employee of his job in a proceeding in which he was not afforded the right to confront and cross-examine witnesses. The Court found that executive orders granting the agency power to establish a system to protect classified information was not a sufficient authorization. The Court reasoned that, absent an express contrary indication, it

assumes that Congress or the President intends to afford persons traditional constitutional rights. Therefore, administrative action raising serious constitutional questions must be explicitly authorized. A decision to employ constitutionally questionable procedures

> must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized, . . . but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them.

360 U.S. at 507 (citation omitted). The Court held that before it would decide whether a person could be deprived of his employment in a proceeding not permitting confrontation of witnesses, "it must be made clear that the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use." *Id.; cf. Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1052 (8th Cir. 1978) ("[W]here . . . potential incursions into sensitive constitutional rights are involved, careful scrutiny is required in delineating the scope of authority that Congress intended the agency to exercise."), *aff'd*, 440 U.S. 689 (1979).

Under the regulations promulgated by the Secretary, a tuna boat operator must agree to allow observers aboard to qualify for a permit allowing the incidental taking of porpoise during fishing operations. We have concluded that stationing the observer on board constitutes a search. Therefore, if such searches raise serious constitutional questions, the observer program must be invalidated. We conclude that they do.

In *See v. City of Seattle*, 387 U.S. 541 (1967), the Supreme Court held that warrantless administrative entry, without consent, into the portions of commercial premises that are not open to the public violates the fourth amendment. *Id.* at 545. The Court reasoned:

> As we explained in *Camara* [*v. Municipal Court*, 387 U.S. 523 (1967)], a search of private houses is presumptively unreasonable if conducted without a warrant. The

> businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant.

Id. at 543. Based on our reading of this statement, we conclude that warrantless searches of tuna boats by government observers are presumptively unreasonable. Therefore, unless these searches fall within a recognized exception to the warrant requirement, they raise serious constitutional questions.

The Secretary contends that the observer program falls within the pervasively-regulated industry exception to the warrant requirement established by *Colonnade Catering Corp. v. United States, supra*, and *United States v. Biswell, supra*. *Colonnade* dealt with warrantless inspections of commercial premises in the regulation of liquor sales; *Biswell* dealt with such searches in the regulation of firearms. More recently, the Court upheld the warrantless inspection of mines. *Donovan v. Dewey*, 452 U.S. 594 (1981). The Court has observed, however, that these cases are "exceptions" involving "relatively unique circumstances." *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978).

The pervasively-regulated industry cases are distinguishable from the case before us. In each case upholding a warrantless search, the inspection was expressly authorized by statute. *See Donovan v. Dewey, supra*, 452 U.S. at 596; *United States v. Biswell, supra*, 406 U.S. at 311-12. The statute in each case was a critical factor in the Court's determination that an exception to the warrant requirement was appropriate. In *Biswell*, the Court stated that "the legality of the search depends not on consent but on the authority of a valid statute." 406 U.S. at 315. In *Donovan v. Dewey*, the Court explained that an exception to the warrant requirement can be recognized only when a "statute's inspection program, in terms of the certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant." 452 U.S. at 603. *See also Colonnade Catering Corp. v. United States, supra*, 397 U.S. at 73 nn.1 & 2, 77 (statute did not include forcible entries without a warrant; applying fourth amendment standards); *United States v. Raub, supra*, 637 F.2d at 1207 (holding that search of a fishing vessel in area where certain fishing

rights were reserved for Indians was within administrative search exception to warrant requirement) ("Both the statute under which the [fishing] regulations were promulgated and the court orders authorized enforcement agents to board vessels without warrants to check identification and to ascertain whether fishermen were in compliance with the applicable fishing regulations.") (footnote omitted).

None of the cases dealt with the issue before us: whether regulations promulgated under a statute authorizing an agency to prescribe regulations to carry out the purposes of an act, but not specifically authorizing warrantless searches, are valid. Our review of the cases convinces us that express statutory authorization of the inspections was critical to their holdings and that, absent that authorization, administrative regulations would not have been held sufficient. The statutes made it clear that Congress had decided "that the imposed procedures [were] necessary and warranted and [had] authorized their use." *Greene v. McElroy, supra*, 360 U.S. at 507.

The limited nature of our holding in this case is obvious. We need not decide whether a properly authorized observer program is constitutional. The current program is of questionable constitutionality because it includes warrantless searches; those searches are not expressly authorized by Congress. Also, we need not decide whether adequate congressional authorization could ever be found in the absence of an express statutory statement.[1] We think that it would be difficult for Congress to manifest clearly its authorization in another manner, but we only hold that congressional authorization in this case is not clear. Except for the general enabling statute, the Secretary's only evidence of congressional authorization is testimony from the Congressional Oversight Hearings held in 1977, five years after the enabling legislation was passed. Whatever the significance of that evidence, it is irrelevant. Congressional authorization in areas of doubtful constitutionality "cannot be assumed by acquiescence or non-action." *Id.* Even assuming that Congress,

1. None of the cases cited to us by the Secretary suggests that an express statutory authorization is dispensable. *United States v. Schafer*, 461 F.2d 856 (9th Cir.), *cert. denied*, 409 U.S. 881 (1972), and *United States v. Watson*, 678 F.2d 765 (9th Cir. 1982), both dealt with regulations promulgated under statutes that expressly authorized inspections. *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973), dealt with regulations promulgated under the auuthority of an executive order, and is not helpful on the question of congressional authorization. *United States v. Rucinski*, 658 F.2d 741 (10th Cir. 1981), *cert. denied*, 102 S. Ct. 1430 (1982), is not binding precedent in this circuit and is distinguishable because it raises questions of contract and waiver that we need not and do not address.

without amending the statute, indicated its approval of the Secretary's actions, that approval is not sufficient evidence of authorization.

We therefore conclude that congressional authorization for the warrantless inspection of tuna boats is not clear, that promulgation of the observer program was not within the powers that Congress granted the Secretary, and that the regulation requiring certificate holders to allow observers on board is invalid.[2]

IV

One part of the order of the district court requires special attention. We have held that the regulation is invalid. The district judge, however, held the regulation invalid only insofar as it allows observers to gather information for non-scientific purposes. 519 F. Supp. at 580-81. We find no basis in the cases for upholding the use of the observer program for scientific but not for non-scientific purposes, nor has any sound reasoning been asserted in support of such a distinction. The regulation mandates an unauthorized search whether the Secretary intends to use the information he gathers for scientific research or in criminal or civil proceedings. Thus, we hold that the regulation requiring the search is invalid for all purposes. We therefore affirm the district court's judgment in part, reverse in part, and remand for entry of injunctive relief consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

2. Our disposition of the case on these grounds makes it unnecessary to reach the captains' argument that the regulation is inconsistent with section 107 of the Act, 16 U.S.C. § 1377, which authorizes searches with warrants or upon reasonable cause to believe that the vessel or its crew is in violation of the Act. We observe, however, that congressional authorization for the two-year observation program, 16 U.S.C. § 1381(d), which has now expired, was part of the same law as section 107, which was not to expire.

GOODWIN, Circuit Judge, dissenting

Assuming that stationing a government agent on board a tuna boat constitutes a search, *United States v. Raub*, 637 F.2d 1205, 1208 (9th Cir. 1980), I would hold that the search in this case is constitutionally permissible.

In *United States v. Raub*, we held that the need to enforce Indian treaty rights and the pervasive regulation of commercial fishing made the warrantless boarding of fishing vessels in the Puget Sound salmon fishery constitutionally permissible. Tuna fishing, like salmon fishing, is a pervasively regulated industry. This case is like *Raub* because enforcement of the Marine Mammal Protection Act similarly requires boarding and observation of fishing vessels.

The federal government's concern about the destruction of porpoise populations by tuna fishing permeates the statutory scheme of which 16 U.S.C. § 1373 is a part. The overriding purpose of the Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1407, is the protection of marine mammals. *Committee for Humane Legislation, Inc. v. Richardson*, 414 F. Supp. 297, 306-309 (D.C. Cir.), *affirmed*, 540 F.2d 1141 (D.C. Cir. 1976). The majority unnecessarily eliminates the only practicable method of enforcing the statute. Without observers stationed aboard tuna vessels, the government is powerless to enforce the Act, or to collect the scientific data upon which intelligent regulation of the tuna industry's incidental harvest of porpoises must be predicated.

Commercial fishing is not only pervasively regulated,[1] but the very

[1] "Federal regulation of the fishing industry dates back to a 1793 federal license requirement for fishing vessels. Act of Feb. 18, 1793, 1 Stat. 305. . . . *See generally* Northern Pacific Halibut Act of 1937, 50 Stat. 325, 16 U.S.C. §§ 772-772j; Act of Aug. 4, 1949, 38 Stat. 692, 16 U.S.C. §§ 781-786 (sponges from Gulf of Mexico or Straits of Florida); Whaling Convention Act of 1950, 64 Stat. 421, 16 U.S.C. §§ 916-916*l*; Tuna Conventions Act of 1950, 64 Stat. 777, 16 U.S.C. §§ 951-961; Northwest Atlantic Fisheries Act of 1950, 64 Stat. 1067, 16 U.S.C. §§ 981-991; North Pacific Fisheries Act of 1954, 68 Stat. 698, 16 U.S.C. §§ 1021-1032; Offshore Shrimp Fisheries Act of 1973, 87 Stat. 1061, 16 U.S.C. §§ 1100b to 1100b-10; Fishery Conservation Management Act of 1976, 90 Stat. 331, 16 U.S.C. §§ 1801-1882." *United States v. Raub*, 637 F.2d 1205, 1209 n. 5 (9th Cir. 1980).

activity at issue in this case has been the focus of Congressional action. Congress has banned the incidental taking of porpoises by vessels under United States jurisdiction, 16 U.S.C. § 1372, except under permits issued pursuant to 16 U.S.C. § 1374. Section 1374 requires that permits issue only in conformance with regulations promulgated under 16 U.S.C. 1373. "Existing and future levels of marine mammal species and population stocks" 16 U.S.C. § 1373(b)(1), and "the marine ecosystem and related environmental considerations," 16 U.S.C. § 1373(b)(3), must be considered in promulgating the regulations. The regulations may restrict the taking of porpoises by species, number, age, sex or other factors, 16 U.S.C. § 1373(c).

The challenged practice is vital to development of reasonable regulations under § 1373(b) and to enforcement of restrictions promulgated under § 1373(c). Acceptance of observers is a reasonable condition for the issuance of a permit to fish under the restrictions of 16 U.S.C. § 1373.

Without the ability to promulgate sensible regulations under the Act and to enforce those regulations, the Secretary's power to issue permits is in doubt. Without validly issued permits, fishing would be impaired. NOAA observers thus not only protect porpoises, but may help to keep American tuna on the supermarket shelves in a manner consistent with the preservation of the mammals. *See Committee for Humane Legislation v. Richardson*, 540 F.2d 1141 (D.C. Cir. 1976); "[T]he Act was deliberately designed to permit takings of marine mammals only when it was *known* that that taking would not be to the disadvantage of the species." *Id.* at 1150 (Emphasis in original.)

Observation of tuna fishing is necessary for enforcement of the Marine Mammal Protection Act. Authorization is thus clearly implied by the statute. Explicit authority for inspections of other regulated industries has been given by statute, and upheld for the same reason as we would uphold this regulation: that the inspections were necessary to carry out the intent of Congress. *See, e.g., Donovan v. Dewey*, 452 U.S. 594 (1981); *United States v. Biswell*, 406 U.S. 311 (1972); *Colonnade Corp. v. United States*, 397 U.S. 72 (1970). The majority's attempt to distinguish these cases is unconvincing.

Here, as in *Colonnade, Biswell* and *Dewey*, the potential for abuse of warrantless searches is slim because the inspection is limited to a narrowly defined and specialized activity, tuna fishing.

Like the businessmen in *Colonnade*, *Biswell* and *Dewey*, boat operators enter the business of tuna fishing with every expectation that inspection, not freedom from inspection, will be the rule. In fact, the tuna industry argued before Congress that its continued cooperation with the inspection program is one reason why permits to kill porpoises should issue.[2]

To strike down this inspection regulation, necessary to both the protection of porpoises and to the continued vitality of the legislative scheme, upon a concern that "congressional authorization in this case is not clear" seems contrary not only to the clear policy of the statute, but also to our own recent precedent. *United States v. Raub, supra.*

[2] John P. Mulligan, representing the Tuna Research Foundation, Inc., stated:

> "it is imperative that we continue present research activities in order that reliable data is produced and that we be given the necessary time to complete the studies. All of the principal [sic] elements of the porpoise program are just at beginning stages -- those being: gear research and development and its related behavorial studies; life histories -- studies and surveys which include the observer program;. . ." Marine Mammal Protection Act: Hearings before Subcommittee on Fisheries and Wildlife Conservation and the Environment, 93rd Cong., 1st Sess., 72 (1973).

In another hearing later in 1974, the industry again lauded the observer program as an example of its cooperation toward the goal of *de minimis* porpoise mortality, and appended to its testimony a summary of observer cruises conducted to that date. Marine Mammal Protection Act: Hearings on H.R. 15273, H.R. 15459, H.R. 15810, H.R. 15967, H.R. 16043, H.R. 16777, before Subcomm. on Fisheries and Wildlife Conservation and the Environment, 93rd Cong., 2d. Sess. 195, 207-211 (1974).

John R. BALELO, Andrew Castagnola, Leo Correia, Manuel S. Jorge, Bryan R. Madruga, Harold Medina, John A. Silva, Ralph F. Silva, Jr., George Sousa, Manuel S. Vargas, Jr., John B. Zolezzi, Jr., Plaintiffs,

v.

Philip M. KLUTZNICK, Secretary of Commerce of the U. S., Richard A. Frank, Administrator, National Oceanic and Atmospheric Administration and Terry Leitzell, Assistant Administrator for Fisheries, National Marine Fisheries Service, Defendants.

Environmental Defense Fund, Inc., and Defenders of Wildlife, Intervenor-Defendants.

No. 80-1646-GT(H).

United States District Court,
S. D. California.

July 24, 1981.

MEMORANDUM DECISION AND ORDER

GORDON THOMPSON, Jr., District Judge.

The case at bar concerns the statutory and constitutional validity of the federal observer program on U. S. tuna vessels which fish in association with porpoise. The issue is whether data gathered by these mandatory on-board observers may be used against the vessel and crew in civil, criminal and forfeiture proceedings. The material facts are not in dispute and the case comes before the Court on cross-motions for summary judgment.

A bit of background concerning tuna purse-seining and the Marine Mammal Protection Act is appropriate. Tuna, especially yellowfin, tend to swim in association with porpoise, which are marine mammals. Capitalizing on this known, but scientifically unexplained phenomenon, tuna purse-seiners often set their nets around schools of porpoise in order to encircle the tuna swimming beneath. In the process of pursing the net, some porpoise may become entrapped and be drowned or injured.

Over the years, the fishermen have developed techniques and gear designed to minimize porpoise mortality and injury, such as smaller mesh nets, escape panels, and a back-down maneuver which causes part of the net to submerge, allowing the porpoise to swim free. Since 1972, porpoise mortality has declined from approximately 300,000 to approximately 18,500 in 1979, based upon figures extrapolated from observed vessels.

In 1972, Congress enacted the Marine Mammal Protection Act, 16 U.S.C. § 1361, *et seq.*, which imposed a moratorium on the taking of marine mammals, but excepted the commercial fishing industry during a two-year period of research and development. Thereafter, the incidental taking of marine mammals in connection with commercial fishing could be allowed by the Secretary of Commerce subject to regulations and permits. 16 U.S.C. §§ 1371, 1374. The Secretary has issued a comprehensive set of regulations, 50 C.F.R. § 216, *et seq.*, which cover nearly all aspects of tuna fishing "on porpoise," from prohibition of setting on certain species of porpoise, to net and maneuvering requirements, to minutiae such as the condition of speedboats, scuba gear and face masks. The penalties provided by the Act for violation of these regulations are severe, ranging from civil penalties of $10,000.00 for each violation, to criminal penalties of one-year imprisonment and/or $20,000.00 fine, to forfeiture of the catch (which may have a value in excess of one million dollars). 16 U.S.C. §§ 1375, 1376.

The case centers about one of the regulations adopted by the Secretary of Commerce, 50 C.F.R. § 216.24(f), which in its present form (effective January 1, 1981) reads in pertinent part:

> "(f) *Observers* . . . (1) The vessel certificate holder of any certified vessel shall, upon the proper notification by the National Marine Fisheries Service, allow an observer duly authorized by the Secretary to accompany the vessel on any or all regular fishing trips for the purpose of conducting research and observing operations, *including collecting information which may be used in civil and criminal penalty proceedings, forfeiture actions, or permit or certificate sanctions.*" [Emphasis added.]

Under this regulation, the National Marine Fisheries Service (NMFS"), a division of the National Oceanographic and Atmospheric Administration, stations federal observers, denominated "biological technicians," aboard tuna vessels for the duration of a fishing trip, which often lasts two to three months and ranges thousands of miles into

the ocean. The observer berths with the crew in the ship's galley (at government expense). During all fishing operations, the observer positions himself on deck and methodically records in numerous log books and forms detailed information regarding porpoise stocks and species, and the compliance of the vessel with the regulations. As part of his duties under the Field Manual issued by NMFS, the observer questions captain and crew regarding their estimates of porpoise. This data is then turned over to the enforcement branch of NMFS, which issues notices of violations against the vessel and crew. Such notices based upon observer-gathered data have been issued and administrative proceedings instituted, commencing in August 1977 under predecessor regulations. Unless restrained, the Secretary indicates he will continue so to use the observer data.

Plaintiff tunaboat captains contend that the observer program as implemented by the regulation is in violation of the statute and of the Fourth Amendment of the Constitution. Defendants contend that it is a valid, and the only practical, method of enforcing compliance with the Act. The starting point for analysis is whether the stationing of the observer on the vessel constitutes a "search" within the meaning of the Fourth Amendment.

[1] Recent decisions of the Ninth Circuit have made it clear that the mere boarding of a vessel, commercial or private, by government agents for any type of investigation or inspection is a search within the Fourth Amendment. This was the specific holding of *United States v. Raub*, 637 F.2d 1205 (9th Cir. 1980), which involved the boarding of a fishing vessel by an NMFS agent to check the owner's Indian identification card. Also, in *United States v. Piner*, 608 F.2d 358 (9th Cir. 1979), the boarding of a pleasure craft in San Francisco Bay for routine safety and document check was held to be a search. Since under the observer program there is boarding by government agents who have, as one of their express purposes, the gathering of information for use in civil, criminal or forfeiture proceedings against the vessel or crew, their entry and presence on board must be deemed a search.

[2, 3] Arguments advanced by Defendants and Intervenors that this is not a search under the "plain view," "open fields," or "public view" doctrines are inapposite. As the Surpeme Court made clear in *Coolidge v. New Hampshire*, 403 U.S. 443, 464-473, 91 S.Ct. 2022, 2037-2042, 29 L.Ed.2d 564 (1971), "plain view" applies only where the initial intrusion is justified and the observation inadvertent or fortuitous. Here, the

observation is not inadvertent, but specifically intended. The "open fields" doctrine regards technical trespasses or insignificant intrusions onto the open exterior areas of private property as "de minimis" and immaterial to the validity of observatins made as a result of such intrusions. Here the intrusion is not insignificant or "abstract and theoretical," but substantial. "Public view" applies where law enforcement makes observations in the same fashion as members of the public. As the Supreme Court indicated in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 329, 99 S.Ct. 2319, 2326, 60 L.Ed.2d 920 (1979), the law enforcement officer must truly be positioned and act as a member of the public, and not assume prerogatives and vantage points not accorded to the pubilc. Here, since members of the public are not permitted aboard tuna vessels at sea, the observer has a private vantage point carved out specially for observers by the regulation and not available to the public.

Thus, the various "view" doctrines are inapposite since the initial boarding of the vessel which gives the observer his continuous viewing platform is itself a search within the Fourth Amendment. The issue then is the authority for the search.

[4] It is axiomatic that an administrator is a creature of statute and that his authority derives solely from the statute pursuant to which he acts. *Soriano v. United States*, 494 F.2d 681, 683 (9th Cir. 1974); *Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129, 56 S.Ct. 397, 80 L.Ed. 528 (1936). We turn then to the statute to ascertain the Secretary's authority to adopt the search regulation.

Congress did, in enacting the Marine Mammal Protection Act, provide specifically for a type of observer program. In § 1381, the Congress established a two-year period of research and development of new fishing techniques and gear to minimize porpoise mortality and injury and an observer program for research related thereto. It is obvious from that section, however, that the sole function of the observers was research and development, and that they had no enforcement role. In any event, that express statutory authorization expired by its own terms on October 21, 1974, and Defendants do not, nor could they, seek to base the Secretary's authority on that section.

[5] In § 1377 of the Act, entitled "Enforcement," Congress expressly conferred authority for searches pursuant to the Act and set the standard for such searches. That section empowered enforcement officers to:

"(2) with a warrant or other process, or *without a warrant if he has reasonable cause* to believe that a vessel or other conveyance subject to the jurisdiction of the United States or any person on board is in violation of any provision of this subchapter or the regulations issued thereunder, *search such vessel*, or conveyance and arrest such person." [Emphasis added.]

Thus, it is clear that Congress authorized warrantless searches under the Act, but only if there exists reasonable cause to believe that the vessel or a person on board is in violation of the Act or regulations.

In the context of search, arrest and forfeiture, the terms "reasonable cause" and "probable cause" have traditionally been used interchangeably. *Stacey v. Emery*, 97 U.S. 642, 645, 24 L.Ed. 1035 (1878); *United States v. 83 Sacks of Wool, Etc.*, 147 F. 747, 748 (D.Me.1906); *Schnorenberg v. United States*, 23 F.2d 38, 39 (7th Cir. 1927); *Levine v. United States*, 138 F.2d 627 (2nd Cir. 1943); *United States v. Fay*, 240 F.Supp. 591, 594 (S.D.N.Y.1965), *cert. denied*, 384 U.S. 964, 86 S.Ct. 1592, 16 L.Ed.2d 675 (1966).

Defendants admit that the placement of observers on tuna vessels is without a warrant and without specific probable cause to believe that the vessel or any person on board is in violation of the Act or regulations. Since the regulation purports to authorize searches of tuna vessels without a warrant and without reasonable cause to believe the vessel or a person on board is in violation of the Act or regulations, it is in direct contravention of § 1377 of the Act, which requires reasonable cause. A regulation which contravenes its enabling statute is void. As the Supreme Court held in striking down a regulation in *Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129, 56 S.Ct. 397, 80 L.Ed. 528 (1936):

"The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress, but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute is a mere nullity." 297 U.S. at 134, 56 S.Ct. at 400.

Defendants and Intervenors seek to avoid this clash between the express terms of the statute and the regulation. Defendants point to the fact that § 1377 applies to "enforcement officers," and that under the

NMFS Field Manual (1981) observers are not enforcement officers. The mere fact that the observer may not be endowed with arrest authority does not mean he performs no enforcement function. His gathering of data for use in civil and criminal proceedings is an important investigative part of the enforcement function. The fact that it is some other branch of the NMFS which converts the data into notices of violation or charges does not immunize the observer's role from the reach of § 1377. If an officer endowed with full enforcement authority is required under § 1377 to have reasonable cause for a warrantless search, one endowed with only partial enforcement authority can claim no superior position.

Intervenor points to the fact that § 1377 applies to all vessels subject to United States jurisdiction under the Act, whether they fish on porpoise or not. This is true, but provides no basis for excepting vessels which do fish on porpoise from the blanket provisions of § 1377, which, by their terms, apply to the entire Act and admit of no exception.

The regulation flies squarely in the face of § 1377 of the Marine Mammal Protection Act and is void.

Defendants and Intervenors lay heavy stress on the contention that the observer program is the only practical means of monitoring compliance with the Act, and that the use of aircraft or vessels for surveillance would be cost-inefficient and result in spotty oversight. On the basis of expediency and the broad powers conferred upon the Secretary to adopt regulations he deems "necessary and appropriate," they urge the Court to find in the Act implied authority for the Secretary's regulation. Of course, such authority cannot be implied if it contravenes the express language of the statute.

Assuming arguendo that § 1377 did not act as a bar to such an implication of authority, there are other reasons why that power cannot be implied. The Court cannot imply the authority in an administrator to define and delineate the scope of his own search authority. As pointed out by the Supreme Court in *United States v. United States District Court*, 407 U.S. 297, 316, 92 S.Ct. 2125, 2136, 32 L.Ed.2d 752 (1972), the executive officer is not a neutral and detached magistrate, but the enforcer of the law.

> "But those charged with this investigation and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks."

[6] It follows that the Court should not imply authority in the administrator to determine whether he may search without a warrant and without probable cause.

Finally, Defendants argue that an agency interpretation of its enabling statute is entitled to great weight and that Congress has ratified that interpretation by failure to object and by renewing appropriations under the Act. The Supreme Court has indicated in *Zuber v. Allen*, 396 U.S. 168, 192, 90 S.Ct. 314, 327, 24 L.Ed.2d 345 (1969), and *S.E.C. v. Sloan*, 436 U.S. 103, 120, 98 S.Ct. 1702, 1713, 56 L.Ed.2d 148 (1978), that an agency interpretation is but one ingredient of the interpretational equation, and that it has greatest weight when the agency participated in drafting the statute and made its interpretation known to Congress at that time. Here there is no contention that the agency interpretation was made known to Congress at the time the statute was adopted in 1972. In fact, the first time the agency issued notices of violations based upon observer data was in August 1977, long after the passage of the Act. In *S.E.C. v. Sloan*, 436 U.S. 103, 120, 98 S.Ct. 1702, 1713, 56 L.Ed.2d 148 (1978), the Supreme Court struck down an agency practice of 34 years' standing even though the Senate committee charged with the oversight of the S.E.C. knew of and specifically endorsed the practice. Also, in *Zuber v. Allen*, 396 U.S. 168, 193, 90 S.Ct. 314, 328, 24 L.Ed.2d 345 (1969), the Court invalidated an agency interpretation of many years' duration despite an intervening re-enactment. *See, also, TVA v. Hill*, 437 U.S. 153, 193, 98 S.Ct. 2279, 2301, 57 L.Ed.2d 117 (1978).

The Court is impressed, too, with the fact that in 1977 the Secretary proposed an amendment to the Act which would have made explicit his authority to use observer data for enforcement purposes. The amendment, while approved by the House, was never taken up by the Senate. See, Hearings before the Committee on Merchant Marine and Fisheries, House of Representatives, 95th Congress, First Session, May 1977, Serial No. 95-3, pp. 35, 109. The post-enactment legislative history does not support the contention that Congress "ratified" the Secretary's interpretation of the Act.

[7] In any event, there is a superseding principle which operates here, making implied authority and ratification irrelevant. A considerable body of case law holds that where agency action affects substantial constitutional rights, or is of questionable constitutionality, an explicit congressional authorization is required rather than implication or acquiescence. *See, e.g., Greene v. McElroy*, 360 U.S. 474, 79 S.Ct. 1400, 3

L.Ed.2d 1377 (1959); *Kent v. Dulles*, 357 U.S. 116, 131, 78 S.Ct. 1113, 1121, 2 L.Ed.2d 1204 (1958); *Schneider v. Smith*, 390 U.S. 17, 26, 88 S.Ct. 682, 687, 19 L.Ed.2d 799 (1968); *see, also, S.E.C. v. Sloan*, 436 U.S. 103, 112, 98 S.Ct. 1702, 1708, 56 L.Ed.2d 148 (1978). As the Supreme Court stated in *Greene v. McElroy*:

> "If acquiescence or implied ratification were enough to show delegation of authority to take actions within the area of questionable constitutionality, we might agree with respondents that delegation has been shown here . . . Such decisions cannot be assumed by acquiescence or non-action. [Citations omitted.] They must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized, . . ., but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them." 360 U.S. at 506, 507, 79 S.Ct. at 1418, 1419.

For all of these reasons the Court is persuaded that the Secretary has neither express nor implied authority to adopt the regulation, and it is void.

The very facts which render the regulation invalid under the statute also render it a violation of the Fourth Amendment.

[8, 9] A warrantless search is per se unreasonable unless it falls within one of the recognized narrow exceptions to the warrant requirement. *Camara v. Municipal Court*, 387 U.S. 523, 528-29, 87 S.Ct. 1727, 1730-31, 18 L.Ed.2d 930 (1967); *See v. City of Seattle*, 387 U.S. 541, 543, 87 S.Ct. 1737, 1739, 18 L.Ed.2d 943 (1967); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312, 98 S.Ct. 1816, 1820, 56 L.Ed.2d 305 (1978); *Michigan v. Tyler*, 436 U.S. 499, 509, 98 S.Ct. 1942, 1949, 56 L.Ed.2d 486 (1978). The only exception urged by Defendants is the "pervasively regulated industry" exception carved out and elaborated upon by the Supreme Court in three cases: *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970); *United States v. Biswell*, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972); and *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978).

Careful analysis of these cases, as well as lower court decisions following in their wake, indicates that the minimum requirements of the exception are (1) an industry which has been subject to historical or pervasive federal regulation such that warrantless inspection is both necessary and to be anticipated, and (2) a statute explicitly authorizing the warrantless inspection. As the Court states in *Biswell*:

> "In the context of a regulatory inspection system of business premises that is carefully limited in time, place and scope, the legality of the search depends not on consent but on the authority of a valid statute." 406 U.S. at 315, 92 S.Ct. at 1596.

The parties have cited, and the Court is aware of, no case which has upheld a warrantless regulatory administrative inspection in the absence of an express statutory authorization for such inspection. The rationale for this requirement of an express statute is undoubtedly to be found in the statement previously quoted from *United States v. United States District Court*, 407 U.S. 297, 316, 92 S.Ct. 2125, 2136, 32 L.Ed.2d 752 (1972), regarding the traditional role of the detached and impartial magistrate in the issuance of a warrant, i. e., the magistrate assures that there is probable cause for the search and that the scope of the search is appropriately limited in time, place and scope. As the Court points out, an administrator cannot fulfill these traditional functions of the magistrate since he, himself, is the searcher. Congress, however, being elected by and responsive to the people, and presumably sensitive to their constitutional rights, comes closer to fulfilling the role of the magistrate than any administrator can. Accordingly, a properly drawn statute in appropriate cases may substitute for the warrant. *See, United States v. Cooper*, 409 F.Supp. 364, 368 (M.D., Fla.1976), *aff'd.*, 542 F.2d 1171 (5th Cir. 1976). While the courts remain the ultimate arbiters of the reasonableness of a search even where authorized by Congress, *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978); *United States v. Piner*, 608 F.2d 358 (9th Cir. 1979); *United States v. Taylor*, 488 F.Supp. 475 (D.Or.1980), on the whole, deference has been shown to the congressional determination of the standard of reasonableness. *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970).

[10] Viewing the regulation in the light of these principles, the Court finds that, insofar as it purports to allow a warrantless search without reasonable cause, it is not expressly authorized by the statute. Accordingly, the "pervasively regulated industry" exception to the warrant

requirement is inapplicable, and the search is therefore in violation of the Fourth Amendment.

[11, 12] The Defendants and Intervenors, finally, seek to justify the regulation as within the broad authority of the Secretary under § 1374 to issue permits authorizing the incidental taking of mammals with "any other terms or conditions which the Secretary deems appropriate." The argument is that since the Secretary may prohibit fishing on porpoise altogether, he may permit it subject to the condition of compliance with the regulation. But, inasmuch as the regulation is invalid under the statute and the Constitution, the Secretary certainly may not condition the grant of a permit upon compliance with an invalid regulation. This would permit him to do indirectly what he cannot do directly. Also, a long line of respectable authority stands for the proposition that the government may not condition a privilege (especially to pursue one's livelihood) upon compliance with an unconstitutional requirement. *Frost v. Railroad Commission*, 271 U.S. 583, 593, 46 S.Ct. 605, 607, 70 L.Ed. 1101 (1926); *United States v. Chicago Milwaukee, Etc. R. R.*, 282 U.S. 311, 328, 51 S.Ct. 159, 163, 75 L.Ed. 359 (1931); *Standard Airlines v. Civil Aeronautics Board*, 177 F.2d 18 (D.C.Cir.1949); *Smyth v. Lubbers*, 398 F.Supp. 777 (W.D. Mich.1975).

The Court therefore concludes that the regulation contravenes both the Marine Mammal Protection Act and the Fourth Amendment of the Constitution and is invalid. If indeed the Secretary believes he has not been given the tools to carry out his assigned responsibilities, the appropriate remedy is to petition Congress, and not to ask the Court to rewrite the language of the statute or the Constitution. *See, e. g., TVA v. Hill*, 437 U.S. 153, 195-195, 98 S.Ct. 2279, 2301-2302, 57 L.Ed.2d 117 (1978). The protection of marine mammals from careless depredation is an important societal value as manifested by the Marine Mammal Protection Act, but it cannot be furthered by the violation of the Fourth Amendment rights of fishermen. The observer program as implemented by the regulation is an extraordinarily intrusive invasion of privacy, entailing the compelled 24-hour a day presence of government agents on Plaintiffs' vessels for two to three months at a time. Whether Congress could constitutionally impose such a program on tuna vessels under the Act is not before the Court, and no opinion on that subject is expressed here. If such a constitutionally sensitive program is to be adopted, however, that choice must be clearly made and declared by Congress, and not by the administrator.

ORDER

The Court declares:

1. That the regulation, 50 C.F.R. 216.24(f), insofar as it allows observers to gather data and information for use in civil or criminal penalty proceedings, forfeiture actions, or permit or certificate sanctions is invalid and void.

2. The Court permanently enjoins Defendants, their successors, agents, employees and anyone acting on their behalf from using observer-gathered data or information under the regulation, or its fruits, for civil or criminal penalty proceedings, forfeiture actions, permits or certificate sanctions, or for any purpose except scientific research.

3. The Court permanently enjoins Defendants their successors, agents, employees and anyone acting on their behalf from requiring Plaintiffs, as a condition to the granting of permits or certificates of inclusion to fish for tuna in association with porpoise, to accept the on-board presence of observers whose information or data may be used for any purpose except scientific research.

JUDGMENT

United States Court of Appeals
FOR THE NINTH CIRCUIT

JOHN R. BALELO, ANDREW CASTAGNOLA, LEO CORREIA, MANUEL S. JORGE, BRYAN R. MADRUGA, et al.,

Plaintiffs-Appellees,

v.

MALCOLM BALDRIGE, Secretary of Commerce of the United States, et al.,
Defendants-Appellants,
ENVIRONMENTAL DEFENSE FUND, INC., et al.,
Intervenor-Defendants-Appellants.

Nos. 81-5806 & 81-5807

DC# CV 80-1646-GT

APPEAL from the United States District Court for the SOUTHERN District of CALIFORNIA

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the SOUTHERN District of CALIFORNIA and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is REVERSED & REMANDED.

Filed and entered JANUARY 24, 1984

UNITED STATES CONSTITUTION, FOURTH AMENDMENT

Art. IV. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

UNITED STATES CODE, TITLE 16

§ 1377. Enforcement

(a) Utilization of personnel

Except as otherwise provided in this subchapter, the Secretary shall enforce the provisions of this subchapter. The Secretary may utilize, by agreement, the personnel, services, and facilities of any other Federal agency for purposes of enforcing this subchapter.

(b) State officers and employees

The Secretary may also designate officers and employees of any State or of any possession of the United States to enforce the provisions of this subchapter. When so designated, such officers and employees are authorized to function as Federal law enforcement agents for these purposes, but they shall not be held and considered as employees of the United States for the purposes of any laws administered by the Director of the Office of Personnel Management.

(c) Warrants and other process for enforcement

The judges of the district courts of the United States and the United States magistrates may, within their respective jurisdictions, upon proper oath or affirmation showing probable cause, issue such warrants or other process, including warrants or other process issued in admiralty proceedings in United States district courts, as may be required for enforcement of this subchapter and any regulations issued thereunder.

(d) Execution of process; arrest; search; seizure

Any person authorized by the Secretary to enforce this subchapter may execute any warrant or process issued by any officer or court of competent jurisdiction for the enforcement of this subchapter. Such a person so authorized may, in addition to any other authority conferred by law—

(1) with or without warrant or other process, arrest any person committing in his presence or view a violation of this subchapter or the regulations issued thereunder;

(2) with a warrant or other process, or without a warrant if he has reasonable cause to believe that a vessel or other conveyance subject to the jurisdiction of the United States or any person on board is in violation of any provision of this subchapter or the regulations issued thereunder, search such vessel or conveyance and arrest such person;

(3) seize the cargo of any vessel or other conveyance subject to the jurisdiction of the United States used or employed contrary to the provisions of this subchapter or the regulations issued hereunder or which reasonably appears to have been so used or employed; and

(4) seize, whenever and wherever found, all marine mammals and marine mammals products taken or retained in violation of this subchapter or the regulations issued thereunder and shall dispose of them, in accordance with regulations prescribed by the Secretary.

(e) Disposition of seized cargo

(1) Whenever any cargo or marine mammal or marine mammal product is seized pursuant to this section, the Secretary shall expedite any proceedings commenced under section 1375(a) or (b) of this title. All marine mammal or marine mammal products or other cargo so seized shall be held by any person authorized by the Secretary pending disposition of such proceedings. The owner or consignee of any such marine mammal or marine mammal product or other cargo so seized shall, as soon as practicable following such seizure, be notified of that fact in accordance with regulations established by the Secretary.

(2) The Secretary may, with respect to any proceeding under section 1375(a) or (b) of this title, in lieu of holding any marine mammal or marine mammal product or other cargo, permit the person concerned to post bond or other surety satisfactory to the Secretary pending the disposition of such proceeding.

(3)(A) Upon the assessment of a penalty pursuant to section 1375(a) of this title, all marine mammals and marine mammal products or other cargo seized in connection therewith may be proceeded against in any

court of competent jurisdiction and forfeited to the Secretary for disposition by him in such manner as he deems appropriate.

(B) Upon conviction for violation of section 1375(b) of this title, all marine mammals and marine mammal products seized in connection therewith shall be forfeited to the Secretary for disposition by him in such manner as he deems appropriate. Any other property or item so seized may, at the discretion of the court, be forfeited to the United States or otherwise disposed of.

(4) If with respect to any marine mammal or marine mammal product or other cargo so seized—

(A) a civil penalty is assessed under section 1375(a) of this title and no judicial action is commenced to obtain the forfeiture of such mammal or product within thirty days after such assessment, such marine mammal or marine mammal product or other cargo shall be immediately returned to the owner or the consignee; or

(B) no conviction results from an alleged violation of section 1375(b) of this title, such marine mammal or marine mammal product or other cargo shall immediately be returned to the owner or consignee if the Secretary does not, with[1] thirty days after the final disposition of the case involving such alleged violation, commence proceedings for the assessment of a civil penalty under section 1375(a) of this title.

§ 1381. Commercial fisheries gear development

(a) Research and development program; report to Congress; authorization of appropriations

The Secretary of the department in which the National Oceanic and Atmospheric Administration is operating (hereafter referred to in this section as the "Secretary") is hereby authorized and directed to immediately undertake a program of research and development for the purpose of devising improved fishing methods and gear so as to reduce to the maximum extent practicable the incidental taking of marine mammals in connection with commercial fishing. At the end of the full twenty-four calendar month period following October 21, 1972, the Secretary shall deliver his report in writing to the Congress with respect to the results of such research and development. For the purposes of this section, there is hereby authorized to be appropriated the sum of $1,000,000 for the fiscal

[1]So in original. Probably should be "within".

year ending June 30, 1973, and the same amount for the next fiscal year. Funds appropriated for this section shall remain available until expended.

(b) Reduction of level of taking of marine mammals incidental to commercial fishing operations

The Secretary, after consultation with the Marine Mammal Commission, is authorized and directed to issue, as soon as practicable, such regulations, covering the twenty-four-month period referred to in section 1371(a)(2) of this title, as he deems necessary or advisable, ot reduce to the lowest practicable level the taking of marine mammals incidental to commercial fishing operations. Such regulations shall be adopted pursuant to section 553 of title 5. In issuing such regulations, the Secretary shall take into account the results of any scientific research under subsection (a) of this section and, in each case, shall provide a reasonable time not exceeding four months for the persons affected to implement such regulations.

(c) Reduction of level of taking of marine mammals in tuna fishery

Additionally, the Secretary and Secretary of State are directed to commence negotiations within the Inter-American Tropical Tuna Commission in order to effect essential compliance with the regulatory provisions of this chapter so as to reduce to the maximum extent feasible the incidental taking of marine mammals by vessels involved in the tuna fishery. The Secretary and Secretary of State are further directed to request the Director of Investigations of the Inter-American Tropical Tuna Commission to make recommendations to all member nations of the Commission as soon as is practicable as to the utilization of methods and gear devised under subsection (a) of this section.

(d) Research and observation

Furthermore, after timely notice and during the period of research provided in this section, duly authorized agents of the Secretary are hereby empowered to board and to accompany any commercial fishing vessel documented under the laws of the United States, there being space available, on a regular fishing trip for the purpose of conducting research or observing operations in regard to the development of improved fishing methods and gear as authorized by this section. Such research and observation shall be carried out in such manner as to minimize interference

with fishing operations. The Secretary shall provide for the cost of quartering and maintaining such agents. No master, operator, or owner of such a vessel shall impair or in any way interfere with the research or observation being carried out by agents of the Secretary pursuant to this section.

50 C.F.R. § 216.24(f)

(f) *Observers*—(1) The vessel certificate holder of any certificated vessel shall, upon the proper notification by the National Marine Fisheries Service, allow an observer duly authorized by the Secretary to accompany the vessel on any or all regular fishing trips for the purpose of conducting research and observing operations, including collecting information which may be used in civil or criminal penalty proceedings, forfeiture actions, or permit or certificate sanctions.

(2) Research and observation duties shall be carried out in such a manner as to minimize interference with commercial fishing operations. The navigator shall provide true vessel locations by latitude and longitude, accurate to the nearest minute, upon request by the observer. No owner, master, operator, or crew member of a certificated vessel shall impair or in any way interfere with the research or observations being carried out.

(3) Marine mammals killed during fishing operations which are accessible to crewmen and requested from the certificate holder or master by the observer shall be brought aboard the vessel and retained for biological processing, until released by the observer for return to the ocean. Whole marine mammals designated as biological specimens by the observer shall be retained in cold storage aboard the vessel until retrieved by authorized personnel of the National Marine Fisheries Service when the vessel returns to port for unloading.

(4) The Secretary shall provide for the payment of all reasonable costs directly related to the quartering and maintaining of such observers on board such vessels. A vessel certificate holder who has been notified that the vessel is required to carry an observer, via certified letter from the National Marine Fisheries Service, shall notify the office from which the letter was received at least five days in advance of the fishing voyage to facilitate observer placement. A vessel certificate holder who has failed to comply with the provisions of this section may not engage in fishing operations for which a general permit is required.

(5) It is unlawful for any person to forcibly assault, impede, intimidate, interfere with, influence or attempt to influence an observer placed aboard a vessel.

No. 83-1734

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOHN R. BALELO, ET AL., PETITIONERS

v.

MALCOLM BALDRIGE, SECRETARY OF COMMERCE OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, under the Marine Mammal Protection Act of 1972, 16 U.S.C. 1361 *et seq.*, the Secretary of Commerce was authorized to issue a regulation requiring tunaboat operators, as a condition of their licenses, to allow government observers to accompany their vessels on regular fishing trips for the purpose of conducting research and collecting data that may be used in civil, criminal, and administrative proceedings.

2. Whether the authorized activities of the government observers violate the tunaboat captains' Fourth Amendment rights.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-35a) is reported at 724 F.2d 753. The opinion of the panel (Pet. App. 36a-47a) is unreported. The opinion of the district court (Pet. App. 48a-58a) is reported at 519 F. Supp. 573.

JURISDICTION

The judgment of the en banc court of appeals was entered on January 24, 1984. The petition for writ of certiorari was filed on April 23, 1984. The ju-

risdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant provisions of the Fourth Amendment; the Marine Mammal Protection Act of 1972, 16 U.S.C. 1377 and 1381; and 50 C.F.R. 216.24(f) are set forth at Pet. App. 60a-64a. Section 103(a) of the Marine Mammal Protection Act of 1972, 16 U.S.C. 1373(a), is set forth as an Appendix to this brief (App., *infra*, 1a).

STATEMENT

1. The Marine Mammal Protection Act of 1972 (the Act), 16 U.S.C. 1361 *et seq.*, was enacted to protect marine mammals to the greatest extent feasible commensurate with the health and stability of the marine ecosystem (16 U.S.C. 1361(6)). To this end, the Act established a moratorium on the taking and importation of marine mammals. The Secretary of Commerce is authorized to waive this moratorium (16 U.S.C. 1371(a)(3)(A)) and permit taking on a case-by-case basis pursuant to regulations promulgated in compliance with 16 U.S.C. 1373.[1] These regulations must be based upon the "best scientific evidence available" (16 U.S.C. 1373(a)). Permits waiving the Act's general moratorium, which are is-

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[1] The Secretary is vested by 16 U.S.C. 1373(a) with authority to

> prescribe such regulations with respect to the taking and importing of animals from each species of marine mammal * * * as he deems necessary and appropriate to insure that such taking will not be to the disadvantage of those species and population stocks and will be consistent wtih the purposes and policies * * * of the Act.

sued pursuant to these regulations, must be based on an affirmative showing that the taking or importation would be consistent with the purposes of the Act (16 U.S.C. 1374(d)(3)). The permit itself must specify the number and kinds of mammals that are authorized to be taken or imported, the location and manner in which they are to be taken or imported, the period within which the permit is valid, and any other terms or conditions that the Secretary deems appropriate (16 U.S.C. 1374(b)(2)).

2. Before 1972, one of the most serious threats to marine mammals was posed by the method of fishing commonly used by tuna fishermen in the eastern tropical Pacific Ocean. For unexplained reasons, schools of yellowfin tuna and porpoises are often found together. The fishermen spot the porpoises on the surface, surround them with a net or seine, and pull the purse cable shut, closing the bottom of the net. The tuna swimming underneath the porpoises are captured, but porpoises also become entangled in the net and, since they are air breathing mammals, frequently drown. Before 1972, approximately 300,000 porpoises per year were killed in this way by American tunaboats. See 40 Fed. Reg. 41535 (1975).

3. In recognition of the serious effects that would have been produced by an immediate and strict application of the Act to the commercial tuna industry, Congress included a special two-year exemption in the Act, which authorized continued taking until 1974 of marine mammals incidental to commercial tuna fishing (16 U.S.C. (1976 ed.) 1371(a)(2)). In an attempt to enable the industry to comply with the Act by the end of the two-year period, Congress created a research program for the purpose of developing improved fishing methods and gear that would minimize the killing of porpoises during tuna fishing

operations (16 U.S.C. 1381(a)). Part of that program entailed the placement of observers on tunaboats to conduct research and observe operations (16 U.S.C. 1381(d)). This program, together with the industry's two-year exemption, expired in October 1974.

Since 1974, the Act has permitted marine mammals to be taken incidentally in the course of commercial fishing operations, but the Act conditions the issuance of permits for such takings on compliance with regulations promulgated by the Secretary in accordance with Section 103 of the Act. 16 U.S.C. 1371(a)(2). The Act specifically sets as its immediate goal "that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate; provided that this goal shall be satisfied in the case of the incidental taking of marine mammals in the course of purse seine fishing for yellowfin tuna by a continuation of the application of the best marine mammal safety techniques and equipment that are economically and technologically practicable" (*ibid.*).

4. Prior to the expiration of the two-year exemption, the Secretary of Commerce, acting pursuant to Section 103 of the Act, promulgated regulations relating to the incidental taking of marine mammals in the course of commercial tuna fishing. These regulations, which took effect on September 30, 1974, provided for the placement of observers on domestic purse seine fishing vessels "for the purpose of conducting research or observation operations" (50 C.F.R. 216.24(f) (1974)). In response to litigation [2]

[2] *Committee for Humane Legislation, Inc.* v. *Richardson*, 414 F. Supp. 297 (D.D.C.), aff'd, 540 F.2d 1141 (D.C. Cir. 1976).

challenging permits issued under these provisions (41 Fed. Reg. 45015 (1976)), the regulations were revised. Quotas were placed on the permissible porpoise mortalities for each year, and permits waiving the Act's general moratorium on the taking of marine mammals were conditioned upon compliance with the observer program (42 Fed. Reg. 12012 (1977)).

These regulations were again revised effective November 28, 1980, and the specific regulation that is the subject of this litigation (50 C.F.R. 216.24(f) (1980)) was issued. That regulation provides that observers may accompany tuna vessels "for the purpose of conducting research and observing operations, including collecting information which may be used in civil or criminal penalty proceedings, forfeiture actions, or permit or certificate sanctions."

5. As the above chronology shows, a program of placing federal observers on board tunaboats has been conducted since 1972. The purpose of the original program, which took place from 1972 to 1974 under express statutory directive, was to enable the government to conduct research and observe operations for the purpose of improving fishing methods and gear (16 U.S.C. 1381(d)). The observer program adopted by the Secretary in 1974 as a condition for waiving the Act's general moratorium on the taking of marine mammals was instituted to assist the Secretary in carrying out his broader responsibilities under the Act. Under the regulation now in effect, each tunaboat must carry an observer on one or more fishing voyages each year. An annual schedule of observer placements is established and distributed well in advance, and the observers' functions are specified in a published manual and are discussed at a predeparture conference attended by the boat's captain and govern-

ment representatives. The observer is authorized to be present on deck and to record on standardized forms his observation of marine mammals encountered on the trip, including those that are pursued and encircled during the course of fishing operations. The observer is not authorized to observe or report on any other activities that may occur during the trip.

The information collected by the observer is used in several ways. It helps the Secretary in developing the terms of the general industry permit authorizing the incidental taking of marine mammals. It is used in the setting of quotas on the number of each species of marine mammals that may be taken. And it also provides a means of monitoring industry compliance with the prohibitions on incidental takings of depleted species (see 16 U.S.C. 1362(1)), as well as compliance with prescribed protective procedures.

6. Petitioners, who are tunaboat captains, brought suit against the Secretary of Commerce and others in the United States District Court for the Southern District of California, seeking declaratory and injunctive relief against the use in legal proceedings of information gathered by the observers. Petitioners argued that the observer program was contrary to the Marine Mammal Protection Act and a violation of their rights under the Fourth Amendment. The district court agreed. It first concluded (Pet. App. 50a) that since "there is boarding by governing agents who have, as one of their express purposes, the gathering of information for use in civil, criminal or forfeiture proceedings against the vessel or crew, their entry and presence on board must be deemed a search." The court then held (*id.* at 51a-55a) that such "searches," which are conducted without probable cause or a warrant, violate 16 U.S.C. 1377(d)

(2), which empowers an enforcement officer to search certain vessels and conveyances without a warrant if he has reasonable cause to believe that they are in violation of the Act or its regulations. The court also concluded (Pet. App. 53a-55a) that since the observers' activities affect substantial constitutional rights, an explicit congressional authorization, rather than an administrative regulation issued pursuant to a more general delegation of authority, was required. Finally, the court held (*id.* at 55a-57a) that the regulation violated the Fourth Amendment. The court declared the regulation unconstitutional insofar as it allowed the observers to gather information for use in civil, criminal, or administrative proceedings (Pet. App. 58a). The court also enjoined the government from using information gathered by the observers "for any purpose except scientific research" (*ibid.*).

7. A divided panel of the court of appeals affirmed the portion of the district court's order declaring the observer regulation invalid insofar as it allows the gathering of information for use in legal proceedings. In addition, the panel reversed the portion of the district court's order allowing observers to accompany fishing boats and gather data for scientific purposes. Pet. App. 44a.

The court of appeals then granted rehearing en banc and, reversing the panel, upheld the validity of the observer program. The court first held that the regulation establishing that program was authorized by statutes granting the Secretary of Commerce broad rulemaking authority to implement the Act (see 16 U.S.C. 1371, 1373). The court found that the regulation is consistent with the objectives and directives of the Act (Pet. App. 10a) and that effective implementation of the Act would be impossible without

using the information collected by observers in enforcement proceedings (Pet. App. 11a).

The court then held (Pet. 15a-21a) that the regulation does not violate the Fourth Amendment. Assuming arguendo that the activity of an on-board observer constitutes a search, the court found (Pet. App. 16a-21a) that the search was reasonable. Relying on cases upholding inspections of closely regulated industries without a warrant or probable cause (*id.* at 17a-18a), the court held (*id.* at 18a-19a) that the tuna industry has been closely regulated by Congress. The court also concluded (*id.* at 18a-19a) that the regulatory scheme of the observer program " 'provides a constitutionally adequate substitute for a warrant' " (*id.* at 19a, quoting *Donovan* v. *Dewey*, 452 U.S. 594, 603 (1981)). Finally, the court observed (Pet. App. 20a) that no "less restrictive alternative for obtaining the information exists."

Judge Pregerson concurred but stated in a separate opinion that, in his view, the observer program did not entail searches, since fishing operations occur "at sea on decks covered only by the sky and open to view by other crew members, nearby vessels, and overflying aircraft" (Pet. App. 21a). Judge Nelson, who also concurred, wrote separately "to emphasize the magnitude of the governmental interest involved in this case" (*id.* at 23a).

In dissent, Judges Tang and Ferguson stated that the promulgation of the regulation was not authorized by Congress (Pet. App. 23a-27a). Judge Canby joined them in concluding that the regulation violated the Fourth Amendment (see Pet. App. 23a, 28a-35a).

ARGUMENT

This case involves the application of undisputed legal principles to a unique factual situation. In our view, the court of appeals' application of those principles was correct, and its opinion clearly does not conflict with any decision of this Court or any other court of appeals. In any event, because of the singular factual setting of this case, the court of appeals' decision is very unlikely to have an appreciable effect in other situations. For all these reasons, further review by this Court is unwarranted.

1. Petitioners first contend (Pet. 10-13) that the regulation establishing the current observer program was not lawfully promulgated pursuant to the Act. They argue (Pet. 12-13) that the regulation is inconsistent with 16 U.S.C. 1377(d)(2), which authorizes warrantless searches to enforce the Act under certain circumstances. They also suggest (Pet. 12) that, contrary to the court of appeals' conclusion (Pet. App. 7a-15a), the Act does not authorize the Secretary to issue such a regulation. These arguments plainly lack merit.

a. The regulation at issue here (50 C.F.R. 216.24(f)), which authorizes federal observers to accompany certificated vessels and observe their fishing operations during certain voyages, is entirely consistent with 16 U.S.C. 1377(d)(2), which provides that any person authorized to enforce the Act

> may, in addition to any other authority conferred by law—* * *
>
> > (2) with a warrant or other process, or without a warrant if he has reasonable cause to believe that a vessel or other conveyance subject to the jurisdiction of the

> United States or any person on board is in violation of any provision of this subchapter or the regulations issued thereunder, search such vessel or conveyance and arrest such person.

First, 16 U.S.C. 1377(d)(2) concerns warrantless *searches*; for reasons explained below, the authorized activities of the observers are not searches.

Second, even if the observers' activities amount to searches, 16 U.S.C. 1377(d)(2), which *confers* authority "in addition to any other authority conferred by law," cannot possibly be read as a limitation on the authority to conduct otherwise lawful searches.

Third, again assuming that the observers conduct searches, 16 U.S.C 1377(d)(2) applies to a much broader category of searches. There is no inconsistency in permitting observers to accompany a vessel and make observations without having probable cause or reasonable suspicion, while requiring reasonable cause for one of the much broader category of searches authorized by 16 U.S.C. 1377(d)(2).

The regulation, as noted, merely authorizes federal observers to accompany "certificated vessels" on regular fishing trips "for the purpose of conducting research and observing operations" (50 C.F.R. 216.24(f)). "Certificated vessels" are those that use certain types of fishing gear that are likely to ensnare marine mammals. See 50 C.F.R. 216.24(b) and (c). By contrast, 16 U.S.C. 1377(d)(2) is not limited to on-board federal observers, but applies to any person authorized to enforce the Act, including other federal and state law enforcement officers, if designated by the Secretary (16 U.S.C. 1377(b)). Under 16 U.S.C. 1377(d)(2), the search is not limited to "certificated vessels" but may include any "vessel or other conveyance subject to the jurisdiction of the United States

or any person on board." Among other things, this provision would therefore permit a search of any vessel, land vehicle, or airplane, and any person on board for evidence of the illegal taking, importation, transportation, possession, or sale of a marine mammal or marine mammal product or evidence of the use of a prohibited method of fishing (see 16 U.S.C. 1372). Finally, while the regulation merely authorizes the observers to conduct research and observe fishing operations, the statute permits a search of any part of the vessel or conveyance, including the hold, the cabin, and the quarters and personal effects (as well as the persons) of those on board.

In sum, there is no inconsistency between 50 C.F.R. 216.24(f) and 16 U.S.C. 1377(d)(2).[3]

b. Contrary to petitioners' suggestion (Pet. 12), it is also apparent that statutory authority exists to issue the regulation. That the Secretary enjoys broad rulemaking power under the Act is unquestioned. Section 1371 grants the Secretary the authority "to determine when, to what extent, if at all, and by what means," the general moratorium imposed by the Act may be waived (16 U.S.C. 1371(a)(3)(A)). Section 1373(a) authorizes the Secretary to prescribe such regulations "as he deems necessary and appropriate to insure that such taking [of species and population stocks of marine mammals] will not be to the disadvantage of those species and population stocks."

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[3] It is also clear that Congress perceived no inconsistency because, as noted, it included a provision in the Act authorizing federal agents from 1972 to 1974 to accompany commercial fishing vessels "for the purpose of conducting research or observing operations" (16 U.S.C. 1381(d)). If that provision was consistent with 16 U.S.C. 1377(d)(2), as Congress must have believed, we fail to see how the present program can be viewed as inconsistent.

Section 1374(b)(2)(D) authorizes the Secretary to include in permits "any * * * terms or conditions which the Secretary deems appropriate." This broad rulemaking authority is amply sufficient to sustain the regulation in question here.

The court of appeals acknowledged (Pet. App. 9a) that the Act does not explicity authorize the Secretary to require a vessel operator, as a condition of securing a permit, to allow an observer to board and accompany the vessel during a voyage. However, the court properly held that the Secretary's broad rulemaking powers included the authority to issue the regulation, which is essential to the effective implementation of the Act (see Pet. App. 9a-12a). See *Haig* v. *Agee*, 453 U.S. 280 (1981) (regulation not authorized "in so many words" by Passport Act upheld); *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1 (1980) (OSHA regulation upheld although not explicitly authorized by OSH Act, since it furthered and rationally complemented the Act); *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356 (1973) (regulations promulgated under broad rulemaking authority sustained where reasonably related to purposes of enabling legislation); *Zemel* v. *Rusk*, 381 U.S. 1 (1965) (refusal to validate passport upheld despite lack of specific statutory authorization).

2. Petitioners' primary argument (Pet. 13-18) is that the regulation authorizes searches that violate the Fourth Amendment. The contention is unfounded.

a. First, the observation of fishing operations is not a search. A search occurs only when there is an invasion of a legitimate expectation of privacy. *Oliver* v. *United States*, No. 82-15 (Apr. 17, 1984), slip op. 6. "What a person knowingly exposes to the public * * * is not a subject of Fourth Amendment protection." *Katz* v. *United States*, 389 U.S. 347, 251

(1967). Since fishing operations take place in the ocean and on the deck of the vessel, those operations are visible to any person on a nearby vessel or in an aircraft flying overhead. Accordingly, it is difficult to see how those operations could be shielded by a legitimate expectation of privacy.

Moreover, as the court of appeals correctly noted (Pet. App. 7a), the captains have no objection to the observers' scientific role or presence aboard ship as such. Indeed, tunaboat owners and captains *champion* the observer program when it comes to calculating porpoise populations and determining allowable mortality levels. They have brought litigation, pending in the Ninth Circuit (*American Tunaboat Association* v. *Baldrige*, No. 82-5588), demanding that the agency prefer observer data over data from aerial and research ship surveys for all aspects of those calculations. They welcome the "intrusion" for this purpose. The only basis of petitioners' complaint is that observers may report for law enforcement purposes that which they see transpiring on the open ocean.

The observations to which petitioners object are indistinguishable from the warrantless observations approved by this Court in *Hester* v. *United States*, 265 U.S. 57 (1924); *Air Pollution Variance Board* v. *Western Alfalfa Corp.*, 416 U.S. 861 (1974), and most recently in *Oliver* v. *United States*, *supra*. In *Oliver*, the Court held that the "open fields" doctrine, first enunciated in *Hester*, permits police officers to enter private property and search a field without a warrant despite the highly secluded setting of the field and the presence of "no trespassing" signs and a locked gate at the entrance. The element of trespass was deemed inconsequential since the landowner had no legitimate expectation of privacy in the field

(*Oliver*, slip op. 11). Here, the observer makes his observations from the deck of a private ship, but that does not convert the observations into a search, since the objects of the observer's attention are visible in the open and may be seen by anyone in the area. "What is observable by the public is observable without a warrant, by the Government inspector as well." *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 315 (1978) (footnote omitted).

Any remaining expectation of privacy on the part of the operators is reduced still further by the pervasive federal regulation of maritime activity in general and commercial fishing in particular.[4] Since tuna fishing is conducted outside territorial waters, tuna boats may lawfully be subjected to a thorough customs search upon leaving and returning to port. Every part of the vessel and every thing and person on board may be searched. Thus there can certainly be no legitimate expectation of privacy with respect to anything on board the vessel at either of those times.

In addition, statutes authorize federal officers to board American vessels even when they are not in port to ensure compliance with various laws. Coast Guard officers have long had the authority to enforce all United States laws on "the high seas and waters over which the United States has jurisdiction" and "[f]or such purposes * * * may at any time go on board of any vessel subject to the jurisdiction, or to

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[4] The commercial fishing industry has been subject to federal regulation since the earliest days of the Nation. *Douglas* v. *Seacoast Products, Inc.*, 431 U.S. 265, 272 (1977). The Tuna Conventions Act, 16 U.S.C. 951 *et seq.*, was passed in 1950 and has subjected the tuna fishing industry to special, detailed regulation since at least 1962.

the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel" (14 U.S.C. 89(a)). The courts of appeals have upheld the authority of the Coast Guard, acting pursuant to this provision, to board vessels subject to the jurisdiction of the United States while on the high seas and, at a minimum, to conduct documentation and safety inspections.[5] Customs officers have been granted similar authority over vessels within customs and inland waters (19 U.S.C. 1581(a) and (b)), and this authority has been upheld by this Court (*United States* v. *Villamonte-Marquez*, 81-1350 (June 17, 1983)). In addition, federal and state officers charged with enforcing federal fishing laws may board and inspect fishing vessels at any time (16 U.S.C. 1861(b)(1)(B)). See *United States* v. *Willis*, 639 F.2d 1335, 1337 (5th Cir. 1981); *United States* v. *Raub*, 637 F.2d 1205 (9th Cir.), cert. denied, 449 U.S. 922 (1980). Petitioners' expectation of privacy as boat operators is further diminished by the presence on board of numerous crewmen, who can observe and report all that takes place.

Petitioners maintain (Pet. 11) that a fishing vessel is unlike other pervasively regulated business prem-

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[5] See, *e.g.*, *United States* v. *Watson*, 678 F.2d 765 (9th Cir. 1982) (reasonable where pursuant to administrative plan); *United States* v. *Green*, 671 F.2d 46 (1st Cir.), cert. denied, 457 U.S. 1135 (1982); *United States* v. *Hilton*, 619 F.2d 127 (1st Cir. 1980); *United States* v. *Williams*, 617 F.2d 1063, 1075-1078 (5th Cir. 1980) (en banc); *United States* v. *Harper*, 617 F.2d 35 (4th Cir.), cert. denied, 449 U.S. 887 (1980) (reasonable where Coast Guard patrolling sea lanes); *United States* v. *Warren*, 578 F.2d 1058, 1064-1066 (5th Cir. 1978) (en banc), cert. denied, 446 U.S. 956 (1980). But see *United States* v. *Streifel*, 665 F.2d 414 (2d Cir. 1981) (dictum that reasonable suspicion required).

ises because "a fishing vessel at sea * * * is the fisherman's floating home." That observation does little to restore the fisherman's legitimate expectation of privacy in the face of the inspection statutes noted above, and it is inconsistent with the operators' position that the observers may be present on board for scientific purposes (see Pet. App. 7a). In any event, this is not a suit by sailors who object to the presence of observers in their mess or quarters. It is a suit by tunaboat captains, who lack standing to complain about alleged invasions of their employees' privacy. Furthermore, the regulation at issue here does no more than to authorize the observers to conduct research and observe fishing operations (50 C.F.R. 216.24(f)). It does not purport to authorize a search of the crew's quarters or possessions or other parts of the vessel.

b. Even if the regulation authorizes searches, those searches are reasonable. This Court has determined the reasonablness of searches "by balancing the need to search against the invasion which the search entails." *Camara* v. *Municipal Court*, 387 U.S. 523, 537 (1967); see also *United States* v. *Villamonte-Marquez*, slip op. 9; *Delaware* v. *Prouse*, 440 U.S. 648, 654 (1979); *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 555 (1976); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 875 (1975).

Here, the need to place observers on tuna boats is great. As previously noted, before the enactment of the Marine Mammal Protection Act of 1972, more than 300,000 porpoises per year were killed by American tuna fishermen (Pet. App. 3a), and the public interest in preventing the extinction of these magnificent species is strong (see *id.* at 23a). There is also no alternative means of ensuring that the provisions of the Act are obeyed (see *id.* at 20a-21a). And

while the governmental interest served by the regulation is substantial, the invasion of privacy resulting from the observers' monitoring of fishing operations is slight, if not nonexistent, for the reasons detailed above.

Petitioners' attack upon the reasonableness of the provision at issue is based almost entirely upon the fact that it was issued by the Secretary as a regulation rather than enacted in statutory form by Congress. Petitioners maintain that this distinguishes the present case from *Donovan* v. *Dewey*, *supra*; *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970), and *United States* v. *Biswell*, 406 U.S. 311 (1972), which also involved inspections, without a warrant or probable cause, of pervasively regulated businesses. Petitioners argue (Pet. 15) that an express statutory authorization is "a *sine qua non* of the exception" embodied in such cases, but neither this Court nor any other court has so held.[6]

Petitioners contend (Pet. 15) that express statutory authorization is necessary because the role played by the magistrate in issuing a warrant must be filled by some branch of government other than the executive. Petitioners state (Pet. 15): "As a separate branch of government and a representative body responsible to the citizens, Congress may with some degree of impartiality and detachment give advance authorization for certain types of warrantless inspection by the executive or enforcement branch * * *." This independent role, petitioners assert (Pet. 16), cannot be performed by the Secretary in issuing regulations.

Petitioners' explanation of the rationale for decisions involving searches of closely regulated businesses

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[6] The Tenth Circuit rejected such an argument in *United States* v. *Rucinski*, 658 F.2d 741 (1981), cert. denied, 455 U.S. 939 (1982).

finds no support in the decisions themselves. This Court has never said that in that situation Congress plays the role of the magistrate. In any event, the discretion of those conducting a search or inspection can be restricted as thoroughly and effectively by regulation as by statute. Petitioners' argument confuses two separate executive functions: the Secretary's rulemaking authority, which must be exercised in accordance with the Administrative Procedure Act, and the authority of agents in the field to make inspections pursuant to the regulations. Once a regulation is duly issued, it can limit administrative inspections as effectively as a statute.

Petitioners maintain (Pet. 16-18) that there is no reason why the government could not obtain administrative warrants prior to placing observers in a tunaboat. But petitioners ignore the fact that the present regulatory scheme gives tunaboat operators far greater procedural protection than they would enjoy if such warrants were obtained. Search warrants are typically sought without notice to the person whose premises are being searched; the proceedings are ex parte; and the search may not be challenged until after it has taken place. Under the present regulatory scheme, by contrast, vessel operators are sent an advance schedule of observer trips and a statement of the authorized scope of observer activities. A tunaboat operator is again notified before an observer is stationed on his vessel, and a predeparture conference is held to discuss what the observer will do. The operator has the opportunity to seek judicial review of a particular scheduled observer trip and to obtain a court order accommodating any relevant privacy interests. See Pet. App. 19a-20a. "Under these circumstances, it is difficult to see what additional protection a warrant requirement would provide" (*Donovan* v. *Dewey*, 452 U.S. at 605).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1984

APPENDIX

Section 103(a) of the Marine Mammal Protection Act of 1972, 16 U.S.C. 1373(a), provides:

> The Secretary, on the basis of the best scientific evidence available and in consultation with the Marine Mammal Commission, shall prescribe such regulations with respect to the taking and importing of animals from each species of marine mammal (including regulations on the taking and importing of individuals within population stocks) as he deems necessary and appropriate to insure that such taking will not be to the disadvantage of those species and population stocks and will be consistent with the purposes and policies set forth in section 1361 of this title.

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No. 83-1734
IN THE

Supreme Court of the United States

October Term, 1983

JOHN R. BALELO, *et al.*,

Petitioners,

vs.

MALCOLM BALDRIGE, Secretary of Commerce of the United States, *et al.*,

Respondents.

BRIEF OF RESPONDENTS ENVIRONMENTAL DEFENSE FUND, INC. AND DEFENDERS OF WILDLIFE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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QUESTIONS PRESENTED

1. Whether the en banc panel of the Ninth Circuit properly ruled, after a detailed analysis of the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. §§ 1361 et seq. and its legislative history, that the Secretary's exercise of his broad MMPA rulemaking authority to require use of observer data for MMPA enforcement is fully consistent with, and indeed essential to implementation of, the MMPA and has been authorized, adopted and approved by Congress?

2. Whether the en banc panel of the Ninth Circuit properly ruled, after careful consideration of this Court's precedent, that use of observer data for MMPA enforcement falls well within the "pervasively regulated industry" exception to the warrant requirement, because (a) the tuna fishing industry has long been subject to detailed federal regulation, (b) the use of observers is the only means for effectuating the important federal interests embodied in the MMPA, and (c) the observer program itself provides all the safeguards that would be provided were an administrative warrant required in this case?

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BRIEF OF RESPONDENTS ENVIRONMENTAL DEFENSE FUND, INC. AND DEFENDERS OF WILDLIFE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Intervenor-defendants and respondents Environmental Defense Fund, Inc. and Defenders of Wildlife respectfully request this Court to deny petitioners' prayer for a writ of certiorari to review the judgment and opinion en banc of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 24, 1984.

PROVISIONS OF CONSTITUTION, STATUTE AND REGULATION INVOLVED.

Petitioners fail to set forth in their Appendix all the relevant provisions of the Marine Mammal Protection

Act, Title 16 United States Code Section 1361, *et seq.* Respondents' Appendices pp. 1a-34a, below, set forth Title 16 United States Code Sections 1361, 1362, 1371, 1372, 1373, 1374, 1375, 1377 and 1381.

STATEMENT OF THE CASE.

A. The Decision Below.

This case involves the statutory and constitutional propriety, under the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. §§ 1361 *et seq.*, of the use of scientific observers on board tuna vessels to monitor compliance with the provisions of the MMPA and the regulations promulgated thereunder, which are designed to prevent needless killing and injury to marine mammals in the course of tuna fishing.

By a decisive vote, an en banc panel of the Ninth Circuit (the "en banc court") rejected petitioners' challenge to the statutory and constitutional propriety of the use of observer data for MMPA enforcement purposes. First, by a 9-2 vote based upon a careful analysis of the MMPA and its legislative history, the en banc court rejected petitioners' contention that in enacting and subsequently amending the MMPA, Congress had not authorized use of observers to ensure compliance with the MMPA. En Banc Op., Pet. App. at 7a-15a. Second, by an 8-3 vote, the en banc court rejected petitioners' argument that use of observers violated the fourth amendment, ruling that even if observation of fishing activities in plain view on vessel decks and the high seas constituted a "search" for fourth amendment purposes, use of observers for MMPA enforcement purposes falls well within the "pervasively regulated industry" exception to the fourth amendment warrant requirement. En Banc Op., Pet. App. at 15a-21a.

Petitioners completely distort the record by arguing that observers are broad criminal law enforcement agents authorized to conduct wide-ranging searches of private areas of tuna vessels and the crew to uncover evidence of any violation of law, whether or not connected with the MMPA. Pet. at 8-11. In fact, observer activities are tightly circumscribed by the MMPA and the applicable regulations. Observers do not "search" areas of the vessel, such as living quarters, in which petitioners or their crews have legitimate privacy interests. Rather, observer data collection activities are limited to observation of fishing activities — the only activities within the MMPA regulatory mandate — which take place on open vessel decks and the high seas. En Banc Op., Pet. App. at 19a-21a; JER at 412-13, 416-18, 500-02.[1] Moreover, petitioners concede that observers may be on their vessels for scientific and research purposes; they only object to use of observer data in MMPA civil and criminal enforcement proceedings. En Banc Op., Pet. App. at 7a; JER at 13-17, 373.[2] In order to correct petitioners' misstatements, respondents set forth below the undisputed facts in the record.

B. The Enactment and Implementation of the MMPA.

Until recently, petitioners fished for tuna by means of "purse seines" in an area of over four million square miles in the eastern tropical Pacific Ocean. During this

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[1]The Petition for Certiorari will be cited herein as "Pet. at ___." Petitioners' Appendix will be cited herein at "Pet. App. ___." The en banc opinion of the United States Court of Appeals for the Ninth Circuit, reported at 724 F.2d 753 (9th Cir. 1984) and reproduced in Petitioners' Appendix at 1a-35a, will be cited herein as "En Banc Op., Pet. App. at ___." The parties' Joint Excerpt of Record before the Ninth Circuit will be cited herein as "JER at ___."

[2]To date, the Secretary has only sought civil penalties for MMPA violations, and has not filed any criminal proceedings.

time period, between a quarter and a third of the tuna caught by the American fleet has been caught in association with porpoises, by a method known as purse seining "on porpoise." In this process, each year thousands of porpoises — air-breathing social mammals — are killed, their carcasses discarded into the sea. En Banc Op., Pet. App. at 3a.

To avert a biological catastrophe of potentially major proportions, Congress in 1972 enacted the MMPA. In explicit terms, the MMPA proclaimed an "immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate." 16 U.S.C. § 1371(a)(2). To achieve this goal, Congress in MMPA Sections 1373 and 1374 granted the Secretary of Commerce broad powers to promulgate and enforce regulations designed to ensure realization of the MMPA objective that populations of marine mammals are not diminished below optimum sustainable levels. Thus, the MMPA directs the Secretary

> to prescribe such regulations with respect to the taking and importing of animals from each species of marine mammal (including regulations on the taking and importing of individuals within population stocks) *as he deems necessary and appropriate to insure* that such taking will not be to the disadvantage of those species and population stocks and will be consistent with the purposes and policies set forth in Section 1361 of this title.[3]

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[3]In its MMPA Declaration of Policy, Congress stated that ". . . Marine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic, and . . . they should be protected . . . to the greatest extent feasible. . . ." 16 U.S.C. § 1361.

16 U.S.C. § 1373(a) (emphasis added). The regulations are to include restrictions on "fishing techniques which have been found to cause undue fatalities to any species of a marine mammal in a fishery." 16 U.S.C. § 1373(c)(5).

MMPA Section 1374 empowers the Secretary to issue permits authorizing incidental taking of marine mammals so long as such permits are consistent with any regulations issued under Section 1373. 16 U.S.C. § 1374(b)(1). Without such permits, any fishing operations involving any incidental or purposeful taking of marine mammals — e.g., petitioners' purse-seining operations — are unlawful under the MMPA. MMPA Section 1374(b)(2)(d) grants the Secretary broad powers to specify "any other terms or conditions which . . . [he] deems appropriate" to the issuance of permits, and Section 1374(d)(1) authorizes the Secretary to prescribe "such procedures as are necessary to carry out this section." *See* En Banc Op., Pet. App. at 5a-6a.

C. The Observer Program and the Challenged Regulation.

Pursuant to his broad rulemaking powers under MMPA Sections 1373 and 1374 — which became effective upon the expiration of the tuna industry's two-year MMPA Section 1371(c) exemption in October 1974 — the Secretary promulgated regulations allowing the incidental taking of porpoises under a permit system which prescribes annual quotas setting permissible levels of marine mammal takings, and specifies detailed requirements concerning fishing gear and methods of fishing operations designed to ensure minimum porpoise mortality. *See Committee for Humane Legislation v. Richardson*, 414 F. Supp. 297, 300-303 (D.D.C.), *aff'd*, 540 F.2d 1141 (D.C. Cir. 1976). In addition, as an essen-

tial part of satisfying his MMPA obligations, the Secretary continued to make use of observers for scientific research and data collection purposes.[4]

Beginning in 1976 — pursuant to the regulation challenged in this action, the present version of which is codified as 50 C.F.R. Section 216.24(f) — the Secretary began to use observer-collected data for MMPA enforcement purposes. En Banc Op., Pet. App. at 6a, 12a; JER at 500. Petitioners do not now dispute that the use of observers is the *only* feasible means of assuring that the MMPA will be enforced.[5] Until recently, the tuna fishing industry operated over an area of well over four million square nautical miles in the eastern tropical Pacific Ocean from off the coast of Australia to the coast of North, Central and South America. JER at 177; Pet. at 5 n.3.[6] In view of the unique situs of petitioners' opera-

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[4]These functions, to which petitioners have never objected, *see* En Banc Op., Pet. App. at 7a; JER at 13-17, 373, have been critical to the Secretary's ability to make the findings required by MMPA Section 1373(d) as a prerequisite for issuance of any permits for fishing operations which involve the incidental taking of marine mammals. Information collected by observers concerning the effectiveness of various fishing methods and techniques in reducing porpoise mortality has also been of critical importance to the Secretary in promulgating regulations — required by the MMPA, *see, e.g.*, 16 U.S.C. §§ 1371(a), 1371(a)(2), 1373 — which are designed to reduce mortality and serious injury to porpoises to levels approaching zero. *See* En Banc Op., Pet. App. at 3a-4a.

[5]Although petitioners argued below that there existed "less intrusive means" of obtaining MMPA-related data, such as the use of aerial overflights, this contention was flatly rejected by the en banc court, and petitioners do not renew it here. *See* En Banc Op., Pet. App. at 20a.

[6]The majority of tuna vessels has recently shifted the locus of its fishing operations from the eastern to the western tropical Pacific, where tuna fishing is *not* accomplished by "purse seines," does *not* involve takings of marine mammals, and is *not* subject to the MMPA permit system and regulations. *See* Marine Mammal Commission, Eleventh Annual Report to Congress for Calendar Year 1983 at 44 (January 31, 1984) (submitted to Congress

tions, absent the use of observers for MMPA enforcement purposes the Secretary would be wholly unable to ensure compliance with the detailed MMPA quotas and the MMPA regulations setting out permissible methods of tuna fishing operations. En Banc Op., Pet. App. at 11a, 20a.

The observer program gives observers no discretion as to which vessels to board. Vessels which are to carry observers are selected each year by neutral criteria. *See* JER 445-54. In advance of each year, the Secretary sends a calendar of scheduled observer trips to all vessel owners, along with a statement of the neutral criteria upon which the calendar is constructed. *See id.* The agency then conducts pre-departure conferences with all parties to ensure a common understanding of the scope of the observers' activities. En Banc Op., Pet. App. at 19a-20a; JER at 445-59.

Observer data collection activities on board the vessels are precisely delineated and sharply circumscribed. As the en banc court found, both 50 C.F.R. § 216.24(f) and particularly the National Marine Fisheries Services ("NMFS") Field Manual authorize observers to engage in observation and recording of *only* those activities directly subject to MMPA and its regulations. En Banc Op., Pet. App. at 19a-21a; JER at 99-115, 428-44, 502. Observer data collection activities thus involve only observation of fishing operations which occur on open vessel decks and the high seas. En Banc Op., Pet. App. at 16a; JER at 412-13, 416-18, 502. While observers must of necessity eat and sleep with the crew and are not physi-

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pursuant to MMPA Section 1404). That the tuna fishing industry may conduct its operations in a manner not subject to the MMPA and the observer requirement defeats petitioners' "unconstitutional condition" argument (*see* Pet. at 18-19), which in any event was rejected by the en banc court and is without merit. *See* En Banc Opp., Pet. App. at 5a-6a, 15a-22a.

cally confined to particular areas of the vessel, they have no authority whatsoever to record or report activities occurring in private areas of the vessel, or "to conduct searches of the persons, personal effects, or living quarters of the [petitioners] and their crews." En Banc Op., Pet. App. at 21a. As the en banc court expressly ruled, any such intrusive searches — which the record reflects have never taken place — "would have to be independently justified under the fourth amendment." *Id.*

SUMMARY OF REASONS FOR DENYING THE WRIT.

Under the standards set forth in Rule 17 of the Rules of this Court, this case does not merit review by certiorari.

First, as petitioners concede, *see* Pet. at 10, there is no conflict in the circuits on the issues presented by this case. *See* Rule 17.1(a). To the extent circuits other than the Ninth have considered Congress' intent in enacting the MMPA, they are in accord with the en banc court's conclusion here that the MMPA must be construed to give effect to Congress' unmistakable intent to protect marine mammals. *See Committee for Humane Legislation v. Richardson*, 414 F. Supp. 297 (D.D.C.), *aff'd*, 540 F.2d 1141 (D.C. Cir. 1976); En Banc Op., Pet. App. at 11a. Similarly, the only other circuit which has directly considered whether the "pervasively regulated industry" exception to the fourth amendment warrant requirement applies in the absence of explicit congressional authorization has concluded, as did the en banc court here, that express congressional authorization is not a prerequisite. *See United States v. Rucinski*, 658 F.2d 741 (10th Cir. 1981), *cert. denied*, 455 U.S. 938 (1982).

Second, this case does not decide an important question of federal law which requires resolution by this Court. *See* Rule 17.1(c). As petitioners concede, as a

practical matter the impact of the en banc opinion here will not extend beyond the Ninth Circuit, because "the impact of the [observer] regulation . . . is, for all practical purposes, geographically circumscribed by . . . the Ninth Circuit." Pet. at 10. Contrary to petitioners' argument, *see* Pet. at 8-10, this case does not establish new legal principles of wide-ranging application. Rather, the en banc court here was required only: (1) to engage in a particularized and detailed inquiry into the MMPA itself and its legislative history, *see* En Banc Op., Pet. App. at 7a-15a; and (2) to conclude that under the particular statutory and regulatory scheme at issue in this case, and under the unique facts of this case, observation of fishing activities which take place on open vessel decks and the high seas does not violate the fourth amendment, *see id.* at 15a-21a.

Thus, as Judge Nelson's concurrence below carefully points out, the en banc court's opinion has application only to the circumstances presented by this case: a regulatory scheme, directed towards a particularized and unique tuna fishing industry, with compelling enforcement needs by virtue of that industry's conduct of its business thousands of miles from land on the high seas. *See* En Banc Op., Pet. App. at 22a-23a. Indeed, as this Court recently emphasized, fourth amendment issues relating to activities on the high seas are *sui generis*, and their decision does not translate into principles applicable in far more common land-based fourth amendment cases. *See United States v. Villamonte-Marquez*, ___ U.S. ___, 77 L. Ed. 2d 22 (1983).

Third, this case is not at odds with applicable decisions of this Court. *See* Rule 17.1(c). In holding that the MMPA itself and its legislative history amply support the Secretary's exercise of his MMPA enforcement authority, the en banc court relied upon a long line of this

Court's precedent that a statute is not to be construed so as to render it a nullity, and that where Congress has been made aware of an administrative construction of a statute and has amended or reauthorized the statute without a hint that the administrative construction is at odds with the will of Congress, the administrative construction is entitled to great weight. En Banc Op., Pet. App. at 7a-13a; *see, e.g., Haig v. Agee*, 453 U.S. 280, 291 (1981); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968). And in holding that observation of fishing activities which take place on open vessel decks and the high seas does not violate the fourth amendment, the en banc court properly relied upon this Court's precedent outlining the "pervasively regulated industry" exception to the fourth amendment warrant requirement. En Banc Op., Pet. App. at 15a-21a; *see e.g., Donovan v. Dewey*, 452 U.S. 594, 599-602 (1981).

Fourth, the en banc court's careful and exhaustive opinion, analyzing in great detail both the congressional authorization and fourth amendment issues, does not merit review. *See* En Banc Op., Pet. App. at 7a-15a (authorization issue); *id.* at 15a-21a (fourth amendment issue). Both segments of the en banc court's ruling were by a decisive vote: (1) the legislative authorization issue commanded the votes of Circuit Judges Browning, Sneed, Kennedy, Anderson, Schroeder, Pregerson, Alarcon, Nelson and Canby; and (2) of these circuit judges, only Judge Canby (along with Judge Ferguson) joined the dissent of Judge Tang on the fourth amendment issue.

Only by ignoring the facts and the en banc court's careful findings are petitioners able to create the impression that observers are broad-based law enforcement agents authorized to conduct unprecedented and wide-ranging "searches" of private areas of tuna vessels to uncover evidence of any type of criminal wrongdoing. *See* Pet. at 8-10. Petitioners' mischaracterization of ob-

server activities stands as the centerpiece of their effort to convince this Court that this case merits review. In fact, as the en banc court found: (1) observers are only authorized to observe and report on fishing activities in plain view on vessel decks and the high seas, *see* En Banc Op., Pet. App. at 16a; (2) observers' activities are tightly circumscribed by the MMPA itself, the applicable regulation, and detailed administrative guidelines, *see id.* at 19a-21a; and (3) observers are not authorized to, nor have they in fact ever conducted, "searches" of private areas of tuna vessels even to uncover evidence of MMPA violations, much less violations of other laws. *See id.* at 19a-21a.

Finally, the propriety of the en banc court's ruling is made clear by this Court's recent decision in *Oliver v. United States*, ___ U.S. ___, 52 U.S.L.W. 4425 (April 17, 1984). Confirming the views expressed below by Judge Pregerson in concurrence, *see* En Banc Op., Pet. App. at 21a-22a, *Oliver* holds that where individuals engage in activities such as cultivation of crops in settings exposed to the public view — whether from adjacent property or by aerial overflight — they have no reasonable expectation that these activities will be private. Thus, government observation of such activities does ***not*** constitute a "search" within the meaning of the fourth amendment. *See* 52 U.S.L.W. at 4428. *Oliver* controls here. Just as in *Oliver* no reasonable expectation of privacy could attach to the harvesting of crops in open fields, here petitioners have no reasonable expectation of privacy regarding their harvesting of precious marine mammal resources, conducted on open vessel decks and the high seas in plain view of passers-by. Indeed, petitioners so conceded below by suggesting — contrary to the undisputed evidence, *see* En Banc Op., Pet. App. at 11a — that MMPA enforcement could be accomplished by observations conducted through aerial overflights or from adjoining Coast Guard vessels. *See* JER at 60.

REASONS FOR DENYING THE WRIT.

A. THE EN BANC COURT PROPERLY RULED THAT USE OF OBSERVER DATA FOR MMPA ENFORCEMENT IS FULLY CONSISTENT WITH THE MMPA AND HAS BEEN AUTHORIZED AND APPROVED BY CONGRESS.

Petitioners essentially concede the propriety of the en banc court's ruling — applying this Court's precedent regarding statutory construction and the import of legislative history — that use of observer-collected data for MMPA enforcement is fully consistent with the MMPA, and has been authorized and approved by Congress. En Banc Op., Pet. App. at 7a-13a. Petitioners' sole argument is that 50 C.F.R. Section 216.24(f) is contrary to the "reasonable cause" requirement for warrantless "search[es] . . . [of] vessels" under MMPA Section 1377(d). *See* Pet. at 10-13. The en banc court properly rejected this argument. En Banc Op., Pet. App. at 15a. There is thus no reason for this Court to review the en banc court's ruling that to read the MMPA as precluding use of observer data for MMPA enforcement purposes would be improperly to render the MMPA itself a nullity. *See* En Banc Op., Pet. App. at 10a-11a.

1. Petitioners Do Not Challenge the En Banc Court's Findings Regarding the Secretary's Broad MMPA Rulemaking Powers, and the MMPA's Purpose and Legislative History.

Following a careful analysis of the MMPA and its legislative history, the en banc court properly reached the following conclusions, none of which petitioners dispute:

> (1) MMPA Sections 1373 and 1374 grant the Secretary broad power to promulgate regulations "necessary and appropriate" to enforce the MMPA's rigorous conservationist mandate that marine mam-

mals are not needlessly to be slaughtered in the course of petitioners' tuna fishing business. En Banc Op., Pet. App. at 8a-9a.

(2) Since the mid-1970's, the Secretary has consistently interpreted this power to authorize the use of observers for MMPA research and enforcement purposes, and this longstanding administrative construction is presumptively correct "unless there are compelling indications that it is wrong." En Banc Op., Pet. App. at 9a-10a, quoting *Haig v. Agee*, 453 U.S 280, 291 (1981) and citing other decisions of this Court.

(3) The "paramount purpose" of the MMPA is the "protection and conservation of marine mammals," and Congress intended the MMPA to be vigorously enforced. En Banc Op., Pet. App. at 10a-11a, citing 16 U.S.C. § 1371; *Committee for Humane Legislation v. Richardson*, 540 F.2d 1141, 1148 (D.C. Cir. 1976).

(4) "Effective implementation of the MMPA would be impossible without the use of observers for enforcement purposes," En Banc Op., Pet. App. at 11a.

(5) To construe the MMPA as not authorizing use of observer-collected data for MMPA enforcement — is "the only practicable method" of enforcing the MMPA — would be to render the MMPA a nullity, a result inappropriate "in the absence of compelling evidence." En Banc Op., Pet. App. at 10a-11a, quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968).

(6) With full knowledge of the continued existence of the observer program and its enforcement aspects gained from oversight hearings and hearings on proposed MMPA amendments, Congress three times

reauthorized the MMPA, twice without substantive amendment (in 1977 and 1978) and once with amendments (in 1981), without in any way disturbing the Secretary's authority to continue the observer program. En Banc Op., Pet. App. at 12a; *see also id.* at 12a nn. 10 & 11.

(7) Congress' actions give rise to a presumption that Congress has authorized, approved and adopted the Secretary's construction of his MMPA Section 1373 and 1374 rulemaking powers to require use of observer data for MMPA enforcement. En Banc Op., Pet. App. at 12a-13a, citing *Haig v. Agee*, 453 U.S. 280, 301 (1981), and other decisions of this Court.

2. The En Banc Court Properly Ruled That MMPA Section 1377(d) Does Not Apply to Observer Data Collection Activities.

Ignoring the en banc court's painstaking analysis of the MMPA and its legislative history, petitioners argue that Congress in MMPA Section 1377(d)(2) set forth a specific "search and seizure standard," authorizing warrantless searches of vessels only if there is reasonable cause to believe a MMPA violation has occurred,[7] and that 50 C.F.R. Section 216.24(f) is inconsistent with this

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[7]MMPA Section 1377(d) empowers persons "authorized by the Secretary to enforce" the MMPA to, "in addition to any other authority conferred by law":

> (2) with a warrant or other process, or *without* a *warrant if he has reasonable cause to believe* that a vessel or other conveyance subject to the jurisdiction of the United States or any person on board is in violation of any provision of this subchapter or the regulations issued thereunder, *search such vessel* or conveyance and arrest such person.

(Emphasis added.) Other subsections of Section 1377(d) grant enforcement officers powers of arrest and seizure.

standard. Pet. at 10-13.[8] The en banc court properly concluded that by the prefatory phrase in Section 1377(d) "in addition to other authority conferred by law," Congress intended to permit the MMPA to be enforced by methods other than those enumerated in Section 1377(d), including regulations — like 50 C.F.R. Section 216.24(f) — promulgated pursuant to the broad rulemaking powers set forth in MMPA Sections 1373 and 1374. En Banc Op., Pet. App. at 15a.

Moreover, petitioners' argument rests upon the fundamentally erroneous premise that even by its very terms, MMPA Section 1377(d) applies to observer data collection activities. In fact, observer data collection, which is limited to boarding the vessel and observation of fishing activities which take place on open vessel decks and the high seas, does *not* involve "search[es] . . . [of] vessel[s]" subject to MMPA Section 1377(d). Petitioners' implicit and unarticulated argument to the contrary — which assumes that if observer activities technically constitute a fourth amendment "search," they automatically involve a "search . . . [of the] vessel" within the meaning of MMPA Section 1377(d) — is in direct conflict with precedent of this Court and the circuit courts which finds a constitutionally and statutorily significant differences between vessel boarding and plain view observations on vessel decks — which observers do — and more thoroughgoing "searches" of private areas of the vessel — which

[8]Petitioners also argue in a footnote that the expiration of MMPA Section 1381(d), which required the Secretary to use observers for scientific research purposes, on October 21, 1974— the day that commercial tuna fishing operations became subject to MMPA permits and regulations under Sections 1373 and 1374 — means that Congress intended to preclude any further use of observers after that date. Pet. at 12 n. 7. The en banc court properly rejected this argument, concluding that Congress in MMPA Section 1381(d) had provided a "model of Congress' view as to what was necessary to carry out the purposes of the statute." En Banc Op., Pet. App. at 13a-14a.

observers may not and do not perform, and which are governed by MMPA Section 1377(d).[9]

Thus, in *United States v. Villamonte-Marquez*, ___ U.S. ___, 77 L. Ed. 2d 22 (1983), this Court last term upheld a warrantless boarding and license inspection on the open deck of a vessel with access to the open seas under "the overarching principle of 'reasonableness' embodied in the Fourth Amendment." *Id.* at 31. In so doing, *Villamonte-Marquez* emphasized the limited degree of intrusion on individuals' reasonable expectations of privacy. *Id.* at 33. In language equally applicable to observer data collection activities, this Court stressed that the boarding and inspection in *Villamonte-Marquez* involved only "public areas" of the vessel, and that "*[n]either the [vessel] nor its occupants are searched,* and visual inspection of the [vessel] is limited to *what can be seen without a search.*" *Id.* at 33, quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976) (emphasis added; brackets supplied by this Court).[10]

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[9]This Court's recent decision in *Oliver v. United States*, ___ U.S. ___, 80 L.Ed.2d 214 (1984), confirms that observer data collection activities are not "searches" within the meaning of the fourth amendment. *See* En Banc Op., Pet. App. at 21a-22a (Ferguson, J. concurring); Section B.1 at pp. 18-20 below.

[10]*See also United States v. Raub*, 637 F.2d 1205, 1210 (9th Cir.), *cert. denied*, 449 U.S. 922 (1980) (while boarding of vessel for inspection of documents might constitute a "search" within the meaning of the fourth amendment, it did not constitute a "search . . . [of the] vessel" within the meaning of Section 776d(d) of the Sockeye Salmon or Pink Salmon Fishing Act of 1947, 16 U.S.C. § 776d(d) — which required reasonable cause to conduct such a search — because it resulted in only a limited intrusion on non-private areas of the vessel); *United States v. Lee*, 274 U.S. 559, 563 (1927) (distinguishing between observation on vessel deck and "exploration below decks or under hatches"); *United States v. Williams*, 617 F.2d 1063, 1086 (5th Cir. 1980) (en banc) (no privacy interest in any part of the vessel hold which would have been in plain view of an agent checking the vessel's identification number; court expresses "serious doubts" as to the existence of a reasonable expectation of privacy in any area of the hold); *United*

As in *Villamonte-Marquez*, the intrusion here on privacy interests occasioned by observer boarding and data collection activities is extremely limited, if at all existent. As the en banc court correctly concluded, "the safeguards built into the observer program ensure that there will be no significant intrusion on [petitioners'] fourth amendment interests." En Banc Op., Pet. App. at 20a. Petitioners can cite no evidence to challenge the en banc court's findings that: (1) observers' activities are limited to data collection related to enforcement of the MMPA, En Banc Op., Pet. App. at 19a-21a; (2) "observers must confine their observations to the fishing operations of the vessel, which occur on the open sea or on deck," *id.* at 16a; *see also* JER at 412-13, 416-18, 502; and (3) the observer regulation and the NMFS Field Manual "do not authorize observers to conduct searches of the persons, personal effects, or living quarters of the captains and their crews. Such a search would have to be independently justified under the fourth amendment." En Banc Op., Pet. App. at 21a.

The en banc court thus properly concluded that MMPA Section 1377(d) does not govern or preclude use of observer data for MMPA enforcement. Because the en banc court properly concluded that use of observers for MMPA enforcement purposes is fully consistent with — indeed mandated by -- the MMPA, there is no reason for this Court to accept this case for review.

States v. Whitmire, 595 F.2d 1303, 1312 (5th Cir. 1979), *cert. denied*, 448 U.S. 906 (1980) (emphasis added) (particular vessel area examined is a "crucial" factor in determining the reasonableness of crew's expectations of privacy; court finds it "difficult to see that a crew member might legitimately claim privacy on the open deck of a fishing smack or in the hold of a cargo vessel . . .").

B. THE EN BANC COURT PROPERLY RULED THAT USE OF OBSERVER DATA FOR MMPA ENFORCEMENT DOES NOT VIOLATE THE FOURTH AMENDMENT.

The en banc court ruled that even if observer activities constitute "searches" within the meaning of the fourth amendment, use of observer data for MMPA enforcement falls squarely within the "pervasively regulated industry" exception to the warrant requirement. En Banc Op., Pet. App. at 15a-21a. Petitioners argue that this exception is inapplicable because (1) the observer program has not been expressly authorized by Congress, and (2) the observer program does not require use of "surprise" inspections. Pet. at 14-16. In a manner fully consistent with this Court's precedent, the en banc court rejected these arguments. Indeed, this Court's recent decision in *Oliver v. United States*, ___ U.S. ___, 52 U.S.L.W. 4425 (April 17, 1984) confirms that observers do not "search" within the meaning of the fourth amendment. There is thus no reason for this Court to review the en banc court's ruling that the observer program is fully consistent with the fourth amendment.

1. Under This Court's Recent Decision in *Oliver v. United States*, Observers Do Not "Search" Within the Meaning of the Fourth Amendment.

The en banc court did not decide the threshold issue of whether observer data collection activities involve "searches" within the meaning of the fourth amendment. *See* En Banc Op., Pet. App. at 15a-16a. Instead, the en banc court concluded that even if "searches," observer activities fall within the scope of the "pervasively regulated industry" exception to the fourth amendment warrant requirement. *Id.* at 16a-21a.

In his concurring opinion, however, Judge Pregerson specifically concluded that observer data collection activities do not constitute "searches." Judge Pregerson reasoned that petitioners cannot have a reasonable expectation of privacy regarding their observed fishing operations because: (1) they have no subjective expectation of privacy regarding fishing operations which take place on the open decks of tuna vessels and on the high seas; and (2) that any claimed expectation of privacy regarding purely commercial fishing operations is not one that society is willing to treat as reasonable. En Banc Op., Pet. App. at 21a-22a.

Judge Pregerson's analysis is confirmed by this Court's recent decision in *Oliver v. United States*, ___ U.S. ___, 52 U.S.L.W. 4425 (April 17, 1984). In holding that an entry by police officers onto a privately-owned field used for cultivation of crops did not constitute a fourth amendment search, this Court focused on the nature of the activities involved:

> [o]pen fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from governmental interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields.

52 U.S.L.W. at 4428. *Oliver* further emphasized that any claim to a reasonable expectation of privacy there was undercut by the fact that the harvesting operations were visible from adjoining land or by aerial overflights. *See id.*

Oliver is fully applicable here. Just as there is no societal interest in protecting the privacy of harvesting crops in open fields, there is no societal interest in protecting the privacy of the harvesting of ocean resources that occurs on open vessel decks and the high seas.

Moreover, as petitioners themselves conceded below, their fishing operations on open vessel decks and the high seas are fully observable by aerial overflights or from nearby vessels. JER at 60. Petitioners thus have no reasonable expectation of privacy regarding their commercial fishing operations; and the use of observers to record these activities does not constitute a "search" within the meaning of the fourth amendment.

2. The En Banc Court Properly Ruled That, Even if "Searches," Observer Data Collection Activities Fall Within the "Pervasively Regulated Industry" Exception to the Warrant Requirement.

The en banc court held that even assuming observer data collection activities constitute "searches" within the meaning of the fourth amendment, the observer program falls squarely within the "pervasively regulated industry" exception to the fourth amendment warrant requirement. This holding was based on a careful application of this Court's precedent. En Banc Op., Pet. App. at 15a-21a; *see Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970); *United States v. Biswell*, 406 U.S. 311 (1972); *Donovan v. Dewey*, 452 U.S. 594 (1981).

This Court's precedent establishes that the warrant requirement is not applicable where a regulatory scheme, aimed at an industry long subject to federal regulation, authorizes administrative inspections that, considered as a whole, are reasonable in light of (1) the limited expectation of privacy on the part of those subject to close regulation; (2) the necessity of the inspection program to effectuation of important federal interests; and (3) the presence of safeguards — such as a close tailoring of the inspection program to meet the regulatory interests — alleviating the need for any protection an administrative

warrant might otherwise afford. *See, e.g., Donovan v. Dewey*, 452 U.S. 594, 598-605 (1981).

The en banc court found — and petitioners do not seriously challenge — that the observer program satisfies all of these prerequisites.[11] Instead, petitioners contend that the "pervasively regulated industry" exception is *per se* inapplicable in the absence of a statute expressly authorizing the warrantless inspection program. *See* Pet. at 14-16. The en banc court properly ruled that this "novel constitutional claim" was without merit. En Banc Op., Pet. App. at 18.

a. The En Banc Court Properly Ruled That Express Statutory Authorization Is Not a Prerequisite to the "Pervasively Regulated Industry" Exception to the Warrant Requirement.

Petitioners divine the existence of an express authorization "requirement" from *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970); *United States v. Biswell*, 406 U.S. 311 (1972); and *Donovan v. Dewey*, 452

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[11] *First*, the en banc court found that federal regulation of the tuna fishing industry has been sufficiently longstanding and pervasive as to bring the industry within the scope of the pervasively regulated industry doctrine. En Banc Op., Pet. App. at 10a-19a.

Second, the en banc court found that the single overriding purpose of the MMPA — to ensure the continued preservation of marine mammals — is an important federal interest, *see* En Banc Op., Pet. App. at 3a, 17a; *see also Committee for Humane Legislation v. Richardson*, 414 F. Supp 297, 306 (D.D.C.) *aff'd* 540 F.2d 1141 (D.C. Cir. 1976), and that "[e]ffective implementation of the MMPA would be impossible without the use of observers for enforcement purposes." En Banc. Op., Pet. App. at 11a.

Finally, the en banc court found that the observer program provides a "constitutionally adequate substitute for a warrant" in that it establishes a predictable and a guided federal presence, imposes sharp limits on the discretion of observers to determine the scope of their observations, and provides a procedural mechanism to accommodate any specific privacy concerns. En Banc Op., Pet. App. at 19a-20a.

U.S. 594 (1981). *See* Pet. at 14-15. But the en banc court properly rejected this argument:

> The captains assume that since the Supreme Court has held that a warrantless search of a closely regulated industry is reasonable when expressly authorized by Congress, the search of such a business violates the fourth amendment if it is conducted pursuant to regulation impliedly authorized by Congress. No authority is cited for this novel constitutional proposition.

En Banc Op., Pet. App. at 18a. The en banc court's holding on this issue is fully consistent with decisions from other circuits.[12]

Petitioners suggest that express statutory authorization is required because only Congress may act as a quasi-magistrate in determining the constitutionality of

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[12]*See United States v. Rucinski*, 658 F.2d 741, 745 (10th Cir. 1981), *cert. denied*, 455 U.S. 938 (1982) (express statutory authorization is not required where the administrative inspection program furthers substantial federal interests); *Downing v. Kunzig*, 454 F.2d 1230, 1232-33 (6th Cir. 1972) (warrantless inspection authorized by regulations of the Secretary of Agriculture upheld against fourth amendment challenge); *United States Nuclear Regulatory Commission v. Radiation Technology, Inc.*, 519 F. Supp. 1266, 1288-91 (D.N.J. 1981) (warrantless inspections authorized by regulations of the Nuclear Regulatory Commission proper under the pervasively regulated industry doctrine); *United States v. Williams*, 617 F.2d 1063, 1074 (5th Cir. 1980) (en banc) ("The source of authority for a search or a seizure need not be statutory . . . . [There may] exist . . . some other source of authority, such as executive authority"). *See also United States v. Davis*, 482 F.2d 893, 908-10 (9th Cir. 1973) (warrantless pre-boarding airport search authorized by regulations of the Federal Aviation Administration upheld against fourth amendment challenge); *United States v. Schaeffer*, 461 F.2d 856, 858-59 (9th Cir.) *cert. denied*, 409 U.S. 881 (1972) (warrantless inspections authorized by regulations of the General Services Administration upheld against fourth amendment challenge).

an administrative inspection program.[13] Pet. at 15. However, the notion that Congress may perform a magisterial function, or that Congress is empowered to make a conclusive determination as to the propriety of a warrantless administrative inspection program, has been firmly rejected by this Court: "It is clear, of course, that no Act of Congress can authorize a violation of the Constitution." *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973); *see also Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). As the en banc court properly concluded: "the proper inquiry when a warrantless search is challenged is whether it is authorized by the fourth amendment—not by an act of Congress." En Banc Op., Pet. App. at 18a.

b. The En Banc Court Properly Found That the Observer Program Incorporates Safeguards Substituting for Any Protections an Administrative Warrant Would Afford.

Finally, petitioners argue that a warrant should be required here because the effectiveness of the observer program does not depend on the use of "surprise" in-

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[13]Petitioners also suggest that an express statutory authorization requirement is supported by *Greene v. McElroy*, 360 U.S. 474 (1959). The en banc court properly rejected this argument. En Banc Op., Pet. App. at 8a. In *Greene*, the Court held that explicit congressional or executive authorization may be required "in areas of doubtful constitutionality" regarding "decisions of great constitutional import and effect." 360 U.S. at 507. Here, however, the observer program itself is not of such doubtful constitutionality, raising serious constitutional concerns. As the en banc court recognized, this Court has consistently held that administrative inspections of commercial property—particularly those subject to pervasive federal regulation—involve relatively limited intrusions on reasonable expectations of privacy, and that such inspections are subject to less vigorous constitutional scrutiny. *Donovan v. Dewey*, 452 U.S. 594, 598-99 (1981); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978); *United States v. Biswell*, 406 U.S. 311, 316 (1972). *See also* En Banc Op., Pet. App. at 17a-18a.

spections. Pet. at 17. As the en banc court properly found, this argument ignores that the observer program itself provides all of the safeguards that would be provided by a warrant, rendering a warrant in this particularized context nothing more than a formalistic gesture. En Banc Op., Pet. App. at 19a-20a.

In the administrative inspection setting, a warrant is designed to serve two functions: (1) to insure that the subject of inspection has been selected on the basis of neutral criteria; and (2) to impose limits on the discretion of officers in the field. *See Camara v. Municipal Court*, 387 U.S. 523, 538-39 (1967).[14] This Court has recognized that a regulatory scheme may itself provide these safeguards, thus obviating the need for a warrant. Thus, in *Donovan v. Dewey*, 452 U.S. 594 (1981), which affirmed the constitutionality of warrantless mine inspections, this Court held that a warrant is not required to conduct administrative inspections in the "pervasively regulated industry" context when the inspection program: (1) establishes a predictable federal presence; (2) limits the scope of the inspection to activities subject to regulation; and (3) provides for a mechanism where the propriety of the particular inspection may be assessed in a judicial hearing. *See id.* at 603-05.

The en banc court properly found that the observer program already incorporates all of these protections. En Banc Op., Pet. App. at 19a-20a. *First*, the en banc court found that the observer program establishes a predictable and regular federal presence. En Banc Op., Pet. App. at 19a-20a. In advance of each year, the agency

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[14]Contrary to petitioners' suggestion, *see* Pet. at 15, it is well-settled that an administrative warrant does not require a showing of probable cause that the subject of an inspection is in violation of regulatory standards. *See Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320-21 (1978); *Camara v. Municipal Court*, 387 U.S. 523, 538-39 (1967).

sends a calendar of scheduled observer trips to all vessel owners, along with the statement of neutral criteria upon which the calendar is constructed. JER at 445-54. The observers have absolutely no discretion to determine which vessels to board. *Cf. Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323 (1978) (unbridled administrative discretion to determine which of a wide category of businesses to subject to inspection).

Second, the en banc court properly found that the MMPA regulatory scheme imposes sharp limits on the scope of observer data collection activities. En Banc Op., Pet. App. at 19a-20a. These activities are precisely delineated by the NMFS Field Manual, which authorizes the observation and recording *only* of fishing activities directly subject to the detailed MMPA regulations. *See* JER at 99-115, 428-44, 502. "[T]he observers must confine their observations to the tuna fishing operations of the vessel, which occur in the open sea or on deck." En Banc Op., Pet. App. at 16a.

Third, the observer regulations require that petitioners be provided with advance notice that observers will be stationed on their vessels. En Banc Op., Pet. App. at 20a. Moreover, the agency conducts pre-departure conferences with vessel owners, masters, observers and agency officials to ensure a common understanding of the scope of observer activities. *See* JER at 455-59. As the en banc court found, this provision not only eliminates the elements of surprise and anxiety offensive to the fourth amendment, *see Delaware v. Prouse*, 440 U.S. 648, 657 (1978), but also provides petitioners with an opportunity to seek a judicial declaration as to the propriety of a particular inspection, or to seek an order accommodating any unusual privacy interest that the vessel owner may have. En Banc Op., Pet. App. at 20a. *See also Donovan*

v. Dewey, 452 U.S. 594, 604-05 (1981).[15] Like the firearms dealer in *Biswell*, or the mine operator in *Donovan*, nothing in the observer program leaves petitioners "to wonder about the purposes of the inspector or the limits of his task." *United States v. Biswell*, 406 U.S. 311, 316 (1972).

The en banc court thus properly concluded that the observer program itself provides all of the protections that would be afforded were a warrant required in the administrative search context of this case. Petitioners do not — and cannot — identify any additional protection an administrative warrant would provide. To require a warrant in this case would be nothing more than a hollow, formalistic gesture. Indeed, because the observer program in fact provides safeguards broader than those that would be afforded petitioners were an administrative warrant required here, in arguing the unconstitutionality of the observer program petitioners are forced to the ironic position that the observer program tramples on their rights because it does not involve "surprise" inspections. There is thus no reason for this Court to accept this case for review.

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[15]In addition, both 50 C.F.R. § 216.24(f) and the detailed MMPA regulations which observers monitor were adopted in accordance with the adjudicatory procedures of the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, providing the fullest opportunity for notice, opportunity to be heard, and administrative and judicial review for all affected parties.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit en banc should be denied.

Dated: May 24, 1984.

Respectfully submitted,

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APPENDICES TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TO APPENDICES

A. STATUTES INVOLVED

Marine Mammal Protection Act, Title 16 United States Code, Section 1361 Et Seq.

1. 16 U.S.C. Section 1361

§ 1361. *Congressional findings and declarations of policy*

The Congress finds that —

(1) certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man's activities;

(2) such species and population stocks should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are part, and, consistent with this major objective, they should not be permitted to diminish below their optimum sustainable population. Further measures should be immediately taken to replenish any species or population stock which has already diminished below that population. In particular, efforts should be made to protect the rookeries, mating grounds, and areas of similar significance for each species of marine mammal from the adverse effect of man's actions;

(3) there is inadequate knowledge of the ecology and population dynamics of such marine mammals and of the factors which bear upon their ability to reproduce themselves successfully;

(4) negotiations should be undertaken immediately to encourage the development of international arrangements for research on, and conservation of, all marine mammals;

(5) marine mammals and marine mammal products either —

(A) move in interstate commerce, or

(B) affect the balance of marine ecosystems in a manner which is important to other animals and animal products which move in interstate commerce,

and that the protection and conservation of marine mammals is therefore necessary to insure the continuing availability of those products which move in interstate commerce; and

(6) marine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic, and it is the sense of the Congress that they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem. Whenever consistent with this primary objective, it should be the goal to obtain an optimum sustainable population keeping in mind the carrying capacity of the habitat.

2. 16 U.S.C. Section 1362

§ 1362. *Definitions*

For the purposes of this Act —

(1) The term "depletion" or "depleted" means any case in which —

(A) the Secretary, after consultation with the Marine Mammal Commission and the Committee of Scientific Advisors on Marine Mammals established under subchapter III of this chapter, determines that a species or population stock is below its optimum sustainable population;

(B) a State, to which authority for the conservation and management of a species or population

stock is transferred under section 1379 of this title, determines that such species or stock is below its optimum sustainable population; or

(C) a species or population stock is listed as an endangered species or a threatened species under the Endangered Species Act of 1973 [16 U.S.C.A. § 1531 et seq.].

(2) The terms "conservation" and "management" mean the collection and application of biological information for the purposes of increasing and maintaining the number of animals within species and populations of marine mammals at their optimum sustainable population. Such terms include the entire scope of activities that constitute a modern scientific resource program, including, but not limited to, research, census, law enforcement, and habitat acquisition and improvement. Also included within these terms, when and where appropriate, is the periodic or total protection of species or populations as well as regulated taking.

(3) The term "district court of the United States" includes the District Court of Guam, District Court of the Virgin Islands, District Court of Puerto Rico, District Court of the Canal Zone, and, in the case of American Samoa and the Trust Territory of the Pacific Islands, the District Court of the United States for the District of Hawaii.

(4) The term "humane" in the context of the taking of a marine mammal means that method of taking which involves the least possible degree of pain and suffering practicable to the mammal involved.

(5) The term "marine mammal" means any mammal which (A) is morphologically adapted to the marine environment (including sea otters and members of the orders Sirenia, Pinnipedia and Cetacea), or (B) pri-

marily inhabits the marine environment (such as the polar bear); and, for the purposes of this Act, includes any part of any such marine mammal, including its raw, dressed, or dyed fur or skin.

(6) The term "marine mammal product" means any item of merchandise which consists, or is composed in whole or in part, of any marine mammal.

(7) The term "moratorium" means a complete cessation of the taking of marine mammals and a complete ban on the importation into the United States of marine mammals and marine mammal products, except as provided in this Act.

(8) The term "optimum sustainable population" means, with respect to any population stock, the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element.

(9) The term "person" includes (A) any private person or entity, and (B) any officer, employee, agent, department, or instrumentality of the Federal Government, of any State or political subdivision thereof, or of any foreign government.

(10) The term "population stock" or "stock" means a group of marine mammals of the same species or smaller taxa in a common spatial arrangement, that interbreed when mature.

(11) The term "Secretary" means —

(A) the Secretary of the department in which the National Oceanic and Atmospheric Administration is operating, as to all responsibility, authority, funding, and duties under this Act with respect to members of the order Cetacea and members, other than walruses, of the order Pinnipedia, and

(B) the Secretary of the Interior as to all responsibility, authority, funding, and duties under this chapter with respect to all other marine mammals covered by this chapter.

(12) The term "take" means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.

(13) The term "United States" includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands of the United States, American Samoa, Guam, and Northern Mariana Islands.

(14) The term "waters under the jurisdiction of the United States" means —

(A) the territorial sea of the United States, and

(B) the waters included within a zone, contiguous to the territorial sea of the United States, of which the inner boundary is a line coterminous with the seaward boundary of each coastal State, and the outer boundary is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured.

3. 16 U.S.C. Section 1371

§ 1371. *Moratorium on taking and importing marine mammals and marine mammal products*

(a) *Imposition; exceptions.* There shall be a moratorium on the taking and importation of marine mammals and marine mammal products, commencing on the effective date of this chapter, during which time no permit may be issued for the taking of any marine mammal and no marine mammal or marine mammal products may be imported into the United States except in the following cases:

(1) Permits may be issued by the Secretary for taking and importation for purposes of scientific research and for public display if —

(A) the taking proposed in the application for any such permit, or

(B) the importation proposed to be made,

is first reviewed by the Marine Mammal Commission and the Committee of Scientific Advisors on Marine Mammals established under title II of this Act [16 USCS §§ 1401 et seq.]. The Commission and Committee shall recommened any proposed taking or importation which is consistent with the purposes and policies of section 2 of this Act [16 USCS § 1361]. The Secretary shall, if he grants approval for importation, issue to the importer concerned a certificate to that effect which shall be in such form as the Secretary of the Treasury prescribes and such importation may be made upon presentation of the certificate to the customs officer concerned.

(2) Marine mammals may be taken incidentally in the course of commercial fishing operations and permits may be issued therefor under section 1374 of this title subject to regulations prescribed by the Secretary in accordance with section 1373 of this title. In any event it shall be the immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching zero mortality and serious injury rate; provided that this goal shall be satisfied in the case of the incidental taking of marine mammals in the course of purse seine fishing for yellowfin tuna by a continuation of the application of the best

marine mammal safety techniques and equipment that are economically and technologically practicable. The Secretary of the Treasury shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards. The Secretary shall insist on reasonable proof from the government of any nation from which fish or fish products will be exported to the United States of the effects on ocean mammals of the commercial fishing technology in use for such fish or fish products exported from such nation to the United States.

(3)(A) The Secretary, on the basis of the best scientific evidence available and in consultation with the Marine Mammal Commission, is authorized and directed, from time to time, having due regard to the distribution, abundance, breeding habits, and times and lines of migratory movements of such marine mammals, to determine when, to what extent, if at all, and by what means, it is compatible with this Act to waive the requirements of this section so as to allow taking, or importing of any marine mammal, or any marine mammal product, and to adopt suitable regulations, issue permits, and make determinations in accordance with sections 102, 103, 104, and 111 of this title [16 USCS §§ 1372-1374, 1381] permitting and governing such taking and importing, in accordance with such determinations: Provided, however, That the Secretary, in making such determinations, must be assured that the taking of such marine mammal is in accord with sound principles of resource

protection and conservation as provided in the purposes and policies of this Act: Provided further, however, That no marine mammal or no marine mammal product may be imported into the United States unless the Secretary certifies that the program for taking marine mammals in the country of origin is consistent with the provisions and policies of this Act. Products of nations not so certified may not be imported into the United States for any purpose, including processing for exportation.

(B) Except for scientific research purposes as provided for in paragraph (1) of this subsection, during the moratorium no permit may be issued for the taking of any marine mammal which has been designated by the Secretary as depleted, and no importation may be made of any such mammal.

(4)(A) During any period of five consecutive years, the Secretary shall allow the incidental, but not the intentional, taking, by citizens of the United States while engaging in commercial fishing operations, of small numbers of marine mammals of a species or population stock that is not depleted if the Secretary, after notice and opportunity for public comment —

(i) finds that the total of such taking during such five-year period will have a neglibible impact on such species or stock; and

(ii) provides guidelines pertaining to the establishment of a cooperative system among the fishermen involved for the monitoring of such taking.

(B) The Secretary shall withdraw, or suspend for a time certain, the permission to take marine mam-

mals under subparagraph (A) if the Secretary finds, after notice and opportunity for public comment, that —

(i) the taking allowed under subparagraph (A) is having more than a negligible impact on the species or stock concerned; or

(ii) the policies, purposes and goals of this chapter would be better served through the application of this title without regard to this subsection.

Sections 1373 and 1374 of this title shall not apply to the taking of marine mammals under the authority of this paragraph.

(5)(A) Upon request therefor by citizens of the United States who engage in a specified activity (other than commercial fishing) within a specified geographical region, the Secretary shall allow, during periods of not more than five consecutive years each, the incidental, but not intentional, taking by citizens while engaging in that activity within that region of small numbers of marine mammals of a species or population stock that is not depleted if the Secretary, after notice (in the Federal Register and in newspapers of general circulation, and through appropriate electronic media, in the coastal areas that may be affected by such activity) and opportunity for public comment —

(i) finds that the total of such taking during each five-year (or less) period concerned will have a negligible impact on such species or stock and its habitat, and on the availability of such species or stock for taking for subsistence uses pursuant to subsection (b) of this section or section 1379(f) of this title; and

(ii) prescribes regulations setting forth —

(I) permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance; and

(II) requirements pertaining to the monitoring and reporting of such taking.

(B) The Secretary shall withdraw, or suspend for a time certain (either on an individual or class basis, as appropriate) the permission to take marine mammals under subparagraph (A) pursuant to a specified activity within a specified geographical region if the Secretary finds, after notice and opportunity for public comment (as required under subparagraph (A) unless subparagraph (C)(i) applies), that —

(i) the regulations prescribed under subparagraph (A) regarding methods of taking, monitoring, or reporting are not being substantially complied with by a person engaging in such activity; or

(ii) the taking allowed under subparagraph (A) pursuant to one or more activities within one or more regions is having, or may have, more than a negligible impact on the species or stock concerned.

(C)(i) The requirement for notice and opportunity for public comment in subparagraph (B) shall not apply in the case of a suspension of permission to take if the Secretary determines that an emergency exists which poses a significant risk to the well-being of the species or stock concerned.

(ii) Sections 1373 and 1374 of this title shall not apply to the taking of marine mammals under the authority of this paragraph.

(b) *Exemptions for Alaskan natives.* Except as provided in Section 1379 of this title, the provisions of this chapter shall not apply with respect to the taking of any marine mammal by any Indian, Aleut, or Eskimo who resides in Alaska and who dwells on the coast of the North Pacific Ocean or the Arctic Ocean if such taking —

(1) is for subsistence purposes; or

(2) is done for purposes of creating and selling authentic native articles of handicrafts and clothing: Provided, That only authentic native articles of handicrafts and clothing may be sold in interstate commerce: And provided further, That any edible portion of marine mammals may be sold in native villages and towns in Alaska or for native consumption. For the purposes of this subsection, the term "authentic native articles of handicrafts and clothing" means items composed wholly or in some significant respect of natural materials, and which are produced, decorated, or fashioned in the exercise of traditional native handicrafts without the use of pantographs, multiple carvers, or other mass copying devices. Traditional native handicrafts include, but are not limited to weaving, carving, stitching, sewing, lacing, beading, drawing, and painting; and

(3) in each case, is not accomplished in a wasteful manner.

Notwithstanding the preceding provisions of this subsection, when, under this chapter, the Secretary determines any species or stock of marine mammal subject to taking by Indians, Aleuts, or Eskimos to be depleted, he may prescribe regulations upon the taking

of such marine mammals by any Indian, Aleut, or Eskimo described in this subsection. Such regulations may be established with reference to species or stocks, geographical description of the area included, the season for taking, or any other factors related to the reason for establishing such regulations and consistent with the purposes of this chapter. Such regulations shall be prescribed after notice and hearing required by section 1373 of this title and shall be removed as soon as the Secretary determines that the need for their imposition has disappeared.

(c) *Hardship exemption.* In order to minimize undue economic hardship to persons subject to this Act, other than those engaged in commercial fishing operations referred to in subsection (a)(2) of this Section, the Secretary, upon any such person filing an application with him and upon filing such information as the Secretary may require showing, to his satisfaction, such hardship, may exempt such person or class of persons from provisions of this Act for no more than one year from the date of the enactment of this Act [enacted Oct. 21, 1972], as he determines to be appropriate.

4. 16 U.S.C. Section 1372

§ 1372. *Prohibitions*

(a) *Taking.* Except as provided in sections 1371, 1373, 1374, 1379, 1381 and 1383 of this title, it is unlawful —

(1) for any person subject to the jurisdiction of the United States or any vessel or other conveyance subject to the jurisdiction of the United States to take any marine mammal on the high seas;

(2) except as expressly provided for by an international treaty, convention, or agreement to which the United States is a party and which was entered

into before the effective date of this title [see Effective date note below] or by any statute implementing any such treaty, convention, or agreement —

(A) for any person or vessel or other conveyance to take any marine mammal in waters or on lands under the jurisdiction of the United States; or

(B) for any person to use any port, harbor, or other place under the jurisdiction of the United States for any purpose in any way connected with the taking or importation of marine mammals or marine mammal products; and

(3) for any person, with respect to any marine mammal taken in violation of this subchapter, to possess that mammal or any product from that mammal; and

(4) for any person to transport, purchase, sell, or offer to purchase or sell any marine mammal or marine mammal product; and

(5) for any person to use, in a commercial fishery, any means or methods of fishing in contravention of any regulations or limitations, issued by the Secretary for that fishery to achieve the purposes of this chapter.

(b) *Importation of pregnant or nursing mammals; depleted species or stock; inhumane taking.* Except pursuant to a permit for scientific research issued under section 1374(c), of this title, it is unlawful to import into the United States any marine mammal if such mammal was —

(1) pregnant at the time of taking;

(2) nursing at the time of taking, or less than eight months old, whichever occurs later;

(3) taken from a species or population stock which the Secretary has, by regulation published in the

Federal Register, designated as a depleted species or stock; or

(4) taken in a manner deemed inhumane by the Secretary.

(c) *Importation of illegally taken mammals.* It is unlawful to import into the United States any of the following:

(1) Any marine mammal which was —

(A) taken in violation of this title; or

(B) taken in another country in violation of the law of that country.

(2) Any marine mammal product if —

(A) the importation into the United States of the marine mammal from which such product is made is unlawful under paragraph (1) of this subsection; or

(B) the sale in commerce of such product in the country of origin of the product is illegal;

(3) Any fish, whether fresh, frozen, or otherwise prepared, if such fish was caught in a manner which the Secretary has proscribed for persons subject to the jurisdiction of the United States, whether or not any marine mammals were in fact incident to the catching of the fish.

(d) *Nonapplicability of prohibitions.* Subsections (b) and (c) of this section shall not apply —

(1) in the case of marine mammals or marine mammal products, as the case may be, to which subsection (b)(3) of this section applies, to such items imported into the United States before the date on which the Secretary publishes notice in the Federal Register of his proposed rulemaking with respect to the designation of the species or stock concerned as depleted; or

(2) in the case of marine mammals or marine mammal products to which subsection (c)(1)(B) or (c)(2)(B) of this section applies, to articles imported into the United States before the effective date of the foreign law making the taking or sale, as the case may be, of such marine mammals or marine mammal products unlawful.

(e) *Retroactive effect.* This Act shall not apply with respect to any marine mammal taken before the effective date of this Act [see effective date note below], or to any marine mammal product consisting of, or composed in whole or in part of, any marine mammal taken before such date.

(f) *Commercial taking of whales.* It is unlawful for any person or vessel or other conveyance to take any species of whale incident to commercial whaling in waters subject to the jurisdiction of the United States.

5. **16 U.S.C. Section 1373**

§ 1373. *Regulations on taking of marine mammals*

(a) *Necessity and appropriateness.* The Secretary, on the basis of the best scientific evidence available and in consultation with the Marine Mammal Commission, shall prescribe such regulations with respect to the taking and importing of animals from each species of marine mammal (including regulations on the taking and importing of individuals within population stocks) as he deems necessary and appropriate to insure that such taking will not be to the disadvantage of those species and population stocks and will be consistent with the purposes and policies set forth in section 2 of this Act [16 USCS § 1361].

(b) *Factors considered in prescribing regulations.* In prescribing such regulations, the Secretary shall give full consideration to all factors which may affect

the extent to which such animals may be taken or imported, including but not limited to the effect of such regulations on —

(1) existing and future levels of marine mammal species and population stocks;

(2) existing international treaty and agreement obligations of the Unied States;

(3) the marine ecosystem and related environmental considerations;

(4) the conservation, development, and utilization of fishery resources; and

(5) the economic and technological feasibility of implementation.

(c) *Allowable restrictions.* The regulations prescribed under subsection (a) of this section for any species or population stock of marine mammal may include, but are not limited to, restrictions with respect to —

(1) the number of animals which may be taken or imported in any calendar year pursuant to permits issued under section 104 of this title [16 USCS § 1374];

(2) the age, size, or sex (or any combination of the foregoing) of animals which may be taken or imported, whether or not a quota prescribed under paragraph (1) of this subsection applies with respect to such animals;

(3) the season or other period of time within which animals may be taken or imported;

(4) the manner and locations in which animals may be taken or imported; and

(5) fishing techniques which have been found to cause undue fatalities to any species of marine mammal in a fishery.

(d) *Procedure.* Regulations prescribed to carry out this section with respect to any species or stock of marine mammals must be made on the record after opportunity for an agency hearing on both the Secretary's determination to waive the moratorium pursuant to section 101(a)(3)(A) of this title [16 USCS § 1371 (a)(3)(A)] and on such regulations, except that, in addition to any other requirements imposed by law with respect to agency rulemaking, the Secretary shall publish and make available to the public either before or concurrent with the publication of notice in the Federal Register of his intention to prescribe regulations under this section —

(1) a statement of the estimated existing levels of the species and population stocks of the marine mammal concerned;

(2) a statement of the expected impact of the proposed regulations on the optimum sustainable population of such species or population stock;

(3) a statement describing the evidence before the Secretary upon which he proposes to base such regulations; and

(4) any studies made by or for the Secretary or any recommendations made by or for the Secretary or the Marine Mammal Commission which relate to the establishment of such regulations.

(e) *Periodic review.* Any regulation prescribed pursuant to this section shall be periodically reviewed, and may be modified from time to time in such manner as the Secretary deems consistent with and necessary to carry out the purposes of this Act.

(f) *Report to Congress.* Within six months after the effective date of this Act [see effective date note below] and every twelve months thereafter, the Secretary

shall report to the public through publication in the Federal Register and to the Congress on the current status of all marine mammal species and population stocks subject to the provisions of this Act. His report shall describe those actions taken and those measures believed necessary, including where appropriate, the issuance of permits pursuant to this title [16 USCS §§ 1371 et seq.] to assure the well-being of such marine mammals.

6. 16 U.S.C. Section 1374

§ 1374. *Permits*

(a) *Issuance.* The Secretary may issue permits which authorize the taking or importation of any marine mammal.

(b) *Requisite provisions.* Any permit issued under this section shall —

(1) be consistent with any applicable regulation established by the Secretary under section 103 of this title [16 USCS § 1373], and

(2) specify —

(A) the number and kind of animals which are authorized to be taken or imported,

(B) the location and manner (which manner must be determined by the Secretary to be humane) in which they may be taken, or from which they may be imported,

(C) the period during which the permit is valid, and

(D) any other terms or conditions which the Secretary deems appropriate.

In any case in which an application for a permit cites as a reason for the proposed taking the overpopulation of a particular species or population stock, the Secre-

tary shall first consider whether or not it would be more desirable to transplant a number of animals (but not to exceed the number requested for taking in the application) of that species or stock to a location not then inhabited by such species or stock but previously inhabited by such species or stock.

(c) *Importation for display or research.* Any permit issued by the Secretary which authorizes the taking or importation of a marine mammal for purposes of display or scientific research shall specify, in addition to the conditions required by subsection (b) of this section, the methods of capture, supervision, care, and transportation which must be observed pursuant to and after such taking or importation. Any person authorized to take or import a marine mammal for purposes of display or scientific research shall furnish to the Secretary a report on all activities carried out by him pursuant to that authority.

(d) *Application procedures; notice; hearing; review.*

(1) The Secretary shall prescribe such procedures as are necessary to carry out this section, including the form and manner in which application for permits may be made.

(2) The Secretary shall publish notice in the Federal Register of each application made for a permit under this section. Such notice shall invite the submission from interested parties, within thirty days after the date of the notice, of written data or views, with respect to the taking or importation proposed in such application.

(3) The applicant for any permit under this section must demonstrate to the Secretary that the taking or importation of any marine mammal under such permit will be consistent with the purposes of this

Act [16 USCS §§ 1361 et seq.] and the applicable regulations established under section 103 of this title [16 USCS § 1373].

(4) If within thirty days after the date of publication of notice pursuant to paragraph (2) of this subsection with respect to any application for a permit any interested party or parties request a hearing in connection therewith, the Secretary may, within sixty days following such date of publication, afford to such party or parties an opportunity for such a hearing.

(5) As soon as practicable (but not later than thirty days) after the close of the hearing or, if no hearing is held, after the last day on which data, or views, may be submitted pursuant to paragraph (2) of this subsection, the Secretary shall (A) issue a permit containing such terms and conditions as he deems appropriate, or (B) shall deny issuance of a permit. Notice of the decision of the Secretary to issue or to deny any permit under this paragraph must be published in the Federal Register within ten days after the date of issuance or denial.

(6) Any applicant for a permit, or any party opposed to such permit, may obtain judicial review of the terms and conditions of any permit issued by the Secretary under this section or of his refusal to issue such a permit. Such review, which shall be pursuant to chapter 7 of title 5, United States Code [5 USCS §§ 701 et seq.], may be initiated by filing a petition for review in the United States district court for the district wherein the applicant for a permit resides, or has his principal place of business, or in the United States District Court for the District of Columbia, within sixty days after the date on which such permit is issued or denied.

(e) *Modification, suspension, and revocation.*

(1) The Secretary may modify, suspend, or revoke in whole or part any permit issued by him under this section —

(A) in order to make any such permit consistent with any change made after the date of issuance of such permit with respect to any applicable regulation prescribed under section 103 of this title [16 USCS § 1373], or

(B) in any case in which a violation of the terms and conditions of the permit is found.

(2) Whenever the Secretary shall propose any modification, suspension, or revocation of a permit under this subsection, the permittee shall be afforded opportunity, after due notice, for a hearing by the Secretary with respect to such proposed modification, suspension, or revocation. Such proposed action by the Secretary shall not take effect until a decision is issued by him after such hearing. Any action taken by the Secretary after such a hearing is subject to judicial review on the same basis as is any action taken by him with respect to a permit application under paragraph (5) of subsection (d) of this section.

(3) Notice of the modification, suspension, or revocation of any permit by the Secretary shall be published in the Federal Register within ten days from the date of the Secretary's decision.

(f) *Possession of permit by issuee or his agent.* Any permit issued under this section must be in the possession of the person to whom it is issued (or an agent of such person) during —

(1) the time of the authorized or taking [taking or] importation;

(2) the period of any transit of such person or agent which is incident to such taking or importation; and

(3) any other time while any marine mammal taken or imported under such permit is in the possession of such person or agent.

A duplicate copy of the issued permit must be physically attached to the container, package, enclosure, or other means of containment, in which the marine mammal is placed for purposes of storage, transit, supervision, or care.

(g) *Fees.* The Secretary shall establish and charge a reasonable fee for permits issued under this section.

(h) *General permits.* Consistent with the regulations prescribed pursuant to section 103 of this title [16 USCS § 1373] and to the requirements of section 101 of this title [16 USCS § 1371], the Secretary may issue general permits for the taking of such marine mammals, together with regulations to cover the use of such general permits.

7. 16 U.S.C. Section 1375

§ 1375. *Penalties*

(a) (1) Any person who violates any provision of this subchapter or of any permit or regulation issued thereunder may be assessed a civil penalty by the Secretary of not more than $10,000 for each such violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing with respect to such violation. Each unlawful taking or importation shall be a separate offense. Any such civil penalty may be remitted or mitigated by the Secretary for good cause shown. Upon any failure to pay a penalty assessed under this subsection, the Secretary may request the Attorney General to institute a civil action

in a district court of the United States for any district in which such person is found, resides, or transacts business to collect the penalty and such court shall have jurisdiction to hear and decide any such action.

(2) In any case involving an alleged unlawful importation of a marine mammal or marine mammal product, if such importation is made by an individual for his own personal or family use (which does not include importation as an accommodation to others or for sale or other commercial use), the Secretary may, in lieu of instituting a proceeding under paragraph (1), allow the individual to abandon the mammal or product, under procedures to be prescribed by the Secretary, to the enforcement officer at the port of entry.

(b) Any person who knowingly violates any provision of this subchapter or of any permit or regulation issued thereunder shall, upon conviction, be fined not more than $20,000 for each such violation, or imprisoned for not more than one year, or both.

8. 16 U.S.C. Section 1376

§ 1376. *Seizure and forfeiture of cargo*

(a) *Application of consistent provisions.* Any vessel or other conveyance subject to the jurisdiction of the United States that is employed in any manner in the unlawful taking of any marine mammal shall have its entire cargo or the monetary value thereof subject to seizure and forfeiture. All provisions of law relating to the seizure, judicial forfeiture, and condemnation of cargo for violation of the customs laws, the disposition of such cargo, and the proceeds from the sale thereof, and the remission or mitigation of any such forfeiture, shall apply with respect to the cargo of any vessel or other conveyance seized in connection with the unlawful taking of a marine mammal insofar as such pro-

visions of law are applicable and not inconsistent with the provisions of this title.

(b) *Penalties.* Any vessel subject to the jurisdiction of the United States that is employed in any manner in the unlawful taking of any marine mammal shall be liable for a civil penalty of not more than $25,000. Such penalty shall be assessed by the district court of the United States having jurisdiction over the vessel. Clearance of a vessel against which a penalty has been assessed, from a port of the United States, may be withheld until such penalty is paid, or until a bond or otherwise satisfactory surety is posted. Such penalty shall constitute a maritime lien on such vessel which may be recovered by action in rem in the district court of the United States having jurisdiction over the vessel.

(c) *Reward for information leading to conviction.* Upon the recommendation of the Secretary, the Secretary of the Treasury is authorized to pay an amount equal to one-half of the fine incurred but not to exceed $2,500 to any person who furnishes information which leads to a conviction for a violation of this title. Any officer or employee of the United States or of any State or local government who furnishes information or renders service in the performance of his official duties shall not be eligible for payment under this section.

9. **16 U.S.C. Section 1377**

§ 1377. *Enforcement*

(a) *Utilization of personnel.* Except as otherwise provided in this title, the Secretary shall enforce the provisions of this title. The Secretary may utilize, by agreement, the personnel, services, and facilities of

any other Federal agency for purposes of enforcing this title.

(b) *State officers and employees.* The Secretary may also designate officers and employees of any State or of any possession of the United States to enforce the provisions of this title. When so designated, such officers and employees are authorized to function as Federal law enforcement agents for these purposes, but they shall not be held and considered as employees of the United States for the purposes of any laws administered by the Civil Service Commission.

(c) *Warrants and other process for enforcement.* The judges of the district courts of the United States and the United States magistrates may, within their respective jurisdictions, upon proper oath or affirmation showing probable cause, issue such warrants or other process, including warrants or other process issued in admiralty proceedings in United States district courts, as may be required for enforcement of this title and any regulations issued thereunder.

(d) *Execution of process; arrest; search; seizure.* Any person authorized by the Secretary to enforce this title may execute any warrant or process issued by any officer or court of competent jurisdiction for the enforcement of this title. Such person so authorized may, in addition to any other authority conferred by law —

(1) with or without warrant or other process, arrest any person committing in his presence or view a violation of this title or the regulations issued thereunder;

(2) with a warrant or other process, or without a warrant if he has reasonable cause to believe that a

vessel or other conveyance subject to the jurisdiction of the United States or any person on board is in violation of any provision of this title or the regulations issued thereunder, search such vessel or conveyance and arrest such person;

(3) seize the cargo of any vessel or other conveyance subject to the jurisdiction of the United States used or employed contrary to the provisions of this title or the regulations issued hereunder or which reasonably appears to have been so used or employed; and

(4) seize, whenever and wherever found, all marine mammals and marine mammal products taken or retained in violation of this title or the regulations issued thereunder and shall dispose of them in accordance with regulations prescribed by the Secretary.

(e) *Disposition of seized cargo.* (1) Whenever any cargo or marine mammal or marine mammal product is seized pursuant to this section, the Secretary shall expedite any proceedings commenced under section 105(a) or (b) of this title [16 USCS § 1375(a) or (b)]. All marine mammals or marine mammal products or other cargo so seized shall be held by any person authorized by the Secretary pending disposition of such proceedings. The owner or consignee of any such marine mammal or marine mammal product or other cargo so seized shall, as soon as practicable following such seizure, be notified of that fact in accordance with regulations established by the Secretary.

(2) The Secretary may, with respect to any proceeding under section 105(a) or (b) of this title [16 USCS § 1375(a) or (b)], in lieu of holding any marine mammal or marine mammal product or other

cargo, permit the person concerned to post bond or other surety satisfactory to the Secretary pending the disposition of such proceeding.

(3) (A) Upon the assessment of a penalty pursuant to section 105(a) of this title [16 USCS § 1375(a)], all marine mammals and marine mammal products or other cargo seized in connection therewith may be proceeded against in any court of competent jurisdiction and forfeited to the Secretary for disposition by him in such manner as he deems appropriate.

(B) Upon conviction for violation of section 105(b) of this title [16 USCS § 1375(b)], all marine mammals and marine mammal products seized in connection therewith shall be forfeited to the Secretary for disposition by him in such manner as he deems appropriate. Any other property or item so seized may, at the discretion of the court, be forfeited to the United States or otherwise disposed of.

(4) If with respect to any marine mammal or marine mammal product or other cargo so seized —

(A) a civil penalty is assessed under section 105(a) of this title [16 USCS § 1375(a)] and no judicial action is commenced to obtain the forfeiture of such mammal or product within thirty days after such assessment, such marine mammal or marine mammal product or other cargo shall be immediately returned to the owner or the consignee; or

(B) no conviction results from an alleged violation of section 105(b) of this title [16 USCS § 1375(b)], such marine mammal or marine mammal product or other cargo shall immediately be returned to the owner or consignee if the Secretary

does not, with[in] thirty days after the final disposition of the case involving such alleged violation, commence proceedings for the assessment of a civil penalty under section 105(a) of this title [16 USCS § 1375(a)].

10. 16 U.S.C. Section 1381

§ 1381. *Commercial fisheries gear development*

(a) *Research and development program; report to Congress; authorization of appropriations.* The Secretary of the department in which the National Oceanic and Atmospheric Administration is operating (hereafter referred to in this section as the "Secretary") is hereby authorized and directed to immediately undertake a program of research and development for the purpose of devising improved fishing methods and gear so as to reduce to the maximum extent practicable the incidental taking of marine mammals in connection with commercial fishing. At the end of the full twenty-four calendar month period following the date of the enactment of this Act [enacted Oct. 21, 1972], the Secretary shall deliver his report in writing to the Congress with respect to the results of such research and development. For the purposes of this section, there is hereby authorized to be appropriated the sum of $1,000,000 for the fiscal year ending June 30, 1973, and the same amount for the next fiscal year. Funds appropriated for this section shall remain available until expended.

(b) *Reduction of level of taking of marine mammals incidental to commercial fishing operations.* The Secretary, after consultation with the Marine Mammal Commission, is authorized and directed to issue, as soon as practicable, such regulations, covering the twenty-four-month period referred to in section 101(a)(2) of this title [16 USCS § 1371(a)(2)], as

he deems necessary or advisable, to reduce to the lowest practicable level the taking of marine mammals incidental to commercial fishing operations. Such regulations shall be adopted pursuant to section 553 of title 5, United States Code [5 USCS § 553]. In issuing such regulations, the Secretary shall take into account the results of any scientific research under subsection (a) of this section and, in each case, shall provide a reasonable time not exceeding four months for the persons affected to implement such regulations.

(c) *Reduction of level of taking of marine mammals in tuna fishery.* Additionally, the Secretary and Secretary of State are directed to commence negotiations within the Inter-American Tropical Tuna Commission in order to effect essential compliance with the regulatory provisions of this Act [16 USCS §§ 1361 et seq.] so as to reduce to the maximum extent feasible the incidental taking of marine mammals by vessels involved in the tuna fishery. The Secretary and Secretary of State are further directed to request the Director of Investigations of the Inter-American Tropical Tuna Commission to make recommendations to all member nations of the Commission as soon as is practicable as to the utilization of methods and gear devised under subsection (a) of this section.

(d) *Research and observation.* Furthermore, after timely notice and during the period of research provided in this section, duly authorized agents of the Secretary are hereby empowered to board and to accompany any commercial fishing vessel documented under the laws of the United States, there being space available, on a regular fishing trip for the purpose of conducting research or observing operations in regard to the development of improved fishing methods and gear as authorized by this section. Such research and

observation shall be carried out in such manner as to minimize interference with fishing operations. The Secretary shall provide for the cost of quartering and maintaining such agents. No master, operator, or owner of such a vessel shall impair or in any way interfere with the research or observation being carried out by agents of the Secretary pursuant to this section.

11. 16 U.S.C. Section 1382

§ 1382. *Regulations and administration*

(a) The Secretary, in consultation with any other Federal agency to the extent that such agency may be affected, shall prescribe such regulations as are necessary and appropriate to carry out the purposes of this title.

(b) Each Federal agency is authorized and directed to cooperate with the Secretary, in such manner as may be mutually agreeable, in carrying out the purposes of this title.

(c) The Secretary may enter into such contracts, leases, cooperative agreements, or other transactions as may be necessary to carry out the purposes of this title and on such terms as he deems appropriate with any Federal or State agency, public or private institution, or other person.

(d) The Secretary shall review annually the operation of each program in which the United States participates involving the taking of marine mammals on land. If at any time the Secretary finds that any such program cannot be administered on lands owned by the United States or in which the United States has an interest in a manner consistent with the purposes of [or] policies of this chapter, he shall suspend the opera-

tion of that program and shall include in the annual report to the public and the Congress required under section 1373(f) of this title his reasons for such suspension, together with recommendations for such legislation as he deems necessary and appropriate to resolve the problem.

B. REGULATION INVOLVED

50 C.F.R. Section 216.24(f)

(45 Fed. Reg. 72196 (October 31, 1980))

(f) *Observers.* — (1) The vessel certificate holder of any certificated vessel shall, upon the proper notification by the National Marine Fisheries Service, allow an observer duly authorized by the Secretary to accompany the vessel on any or all regular fishing trips for the purpose of conducting research and observing operations, including collecting information which may be used in civil or criminal penalty proceedings, forfeiture actions, or permit or certificate sanctions.

(2) Research and observation duties shall be carried out in such a manner as to minimize interference with commercial fishing operations. The navigator shall provide true vessel locations by latitude and longitude, accurate to the nearest minute, upon request by the observer. No owner, master, operator, or crew member of a certificated vessel shall impair or in any way interfere with the research or observations being carried out.

(3) Marine mammals killed during fishing operations which are accessible to crewmen and requested from the certificate holder or master by the observer shall be brought aboard the vessel and retained for biological processing, until released by the observer for return to the ocean. Whole marine mammals designated as biological specimens by the observer shall be retained in cold storage aboard the vessel until retrieved by authorized personnel of the National Marine Fisheries Service when the vessel returns to port for unloading.

(4) The Secretary shall provide for the payment of all reasonable costs directly related to the quartering

and maintaining of such observers on board such vessels. A vessel certificate holder who has been notified that the vessel is required to carry an observer, via certified letter from the National Marine Fisheries Service, shall notify the office from which the letter was received at least five days in advance of the fishing voyage to facilitate observer placement. A vessel certificate holder who has failed to comply with the provisions of this section may not engage in fishing operations for which a general permit is required.

(5) It is unlawful for any person to forcibly assault, impede, intimidate, interfere with, influence or attempt to influence an observer placed aboard a vessel.

No. 83-1734

IN THE

Supreme Court of the United States

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Petitioners,

v.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

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1. The government would have the Court believe that this case merely involves "the application of undisputed legal principles to a unique factual situation" (Gov't. Brief in Opp. 9). The seven appellate opinions rendered in this case, and the disagreement reflected in them, belies the government's contention. Regardless of how one characterizes the factual situation, the legal principles at issue here are in sharp dispute and present fundamental questions under the Fourth Amendment, questions that transcend the factual setting in which they arise.

The government itself admits as much: In seeking to avoid further review, the government argues that it is unnecessary for Congress to authorize warrantless searches and that the executive branch may, by

regulation, bestow upon itself the power to search without a warrant whenever it seeks to do so and under whatever restrictions it deems appropriate. (Gov't. Brief in Opp. 17-18.) The decisions of this Court under the Fourth Amendment are firmly against such an extraordinary arrogation of executive power, as we discussed in our Petition (Pet. for cert. 9-10, 13-18.) Once before the executive branch advanced such a position and the Court answered thusly: "But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionality sensitive means in pursuing their tasks." *United States v. United States District Court*, 407 U.S. 297, 316 (1972).

2. Citing *Oliver v. United States*, 52 U.S.L.W. 4425 (April 17, 1984), the government contends that the monitoring of activities by government agents stationed aboard tuna vessels for the purpose of gathering evidence of criminal conduct does not involve a search. (Gov't. Brief in Opp. 12-16.) But *Oliver* neither addresses nor affects the issues presented by this case.

First, the basis of the Court's decision was that the "open fields" are not within the class of places and things specifically enumerated in the Fourth Amendment, namely "persons, houses, papers and effects." (52 U.S.L.W. 4427.) The Court noted that "effects" encompass personal property and not realty. By contrast, this case involves fishing vessels, which are not only the fishermen's home at sea, but also personalty, and thus within the class of objects protected by the Fourth Amendment.

Second, *Oliver* entailed only a brief, transitory entry by police officers upon the wooded hinterland beyond a residence. Neither *Oliver* nor any other case cited by defendants involved a 90-day encampment on the premises by government agents to conduct extensive surveillance of the activities of the owners. In order to equate *Oliver* to this case, one would have to posit a situation in which the police officer takes up residence in the farm house, eats his meals in the family dining room, and conducts a three month surveillance of the premises through the living room window. The government agents here, like the police officer in the example above, are not monitoring activities from the vantage point of a member of the public. *See, Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 329 (1979); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 315 (1978).[1]

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[1] The government argues (Gov't. Brief in Opp. 13) that the fishermen welcome the intrusion of agents as scientific observers, and indeed champion

(Continued on page 3)

If the administrative stationing of government surveillance agents aboard fishing vessels is not a search, there is nothing to prevent any agency from placing an agent aboard every vessel flying the United States flag or departing a domestic port to enforce any of the myriad laws related to shipping, from maritime safety to oil pollution. There is no basis in law or logic for treating vessels as "open fields," ineligible for Fourth Amendment protection.

3. In addressing the statutory search and seizure standard of the MMPA, 16 U.S.C. § 1377(d)(2) (Pet. for Cert. 11-12), the government does not seek to defend the *en banc* majority's rationale based upon the "other authority conferred by law" language. (Gov't. Brief in Opp. 10-11.) Rather, it offers two new avenues for avoiding the prohibition against warrantless searches which are not based upon reasonable cause.

First, the government points out that 16 U.S.C. § 1377(d)(2) applies to all vessels and conveyances under the Act, whereas the regulation applies only to "certificated vessels" fishing for tuna or porpoise, and that the statute covers a broader spectrum of searches than the regulation contemplates. This distinction is meaningless: it merely emphasizes that the general rule includes a variety of different particulars.

(Footnote 1 continued from page 2)

observer data over all other in a lawsuit now pending in the Ninth Circuit, *American Tunaboat Association v. Baldrige*, No. 82-5588. It is true that before the agency transformed hitherto pure scientists into government informants in 1977, the fishermen willingly accepted them on their vessels. The nature of their intrusion changed drastically, however, when scientific study became criminal surveillance. The government distorts the American Tunaboat Association suit. Despite the fact that the principal jusitification for the observer regulation is the gathering of essential scientific data, in 1980 the government sought to *eliminate* use of observer data in estimating porpoise school size. The administrative law judge castigated the agency for spending years gathering observer data only to cast it aside as unreliable when the results did not fit preconceived theories. See, Recommended Decision of A.L.J. Dolan (July 18, 1980), *In the Matter of Proposed Regulations to Govern the Taking of Marine Mammals Incidental to Commercial Fishing Operations*, U.S. Department of Commerce, Docket No. MMPAH 1980-1, pp. 5-9. The suit by The American Tunaboat Association is not inconsistent with plaintiffs' statutory and constitutional objections to the regulation here. It simply maintains that the government may not blow hot and cold with observer-gathered data, using it when convenient and ignoring it when not.

Second, the government claims there is no inconsistency between a warrantless observer stationing and the statute's search and seizure standard because Congress specifically provided a limited observer program for research and development between 1972 and 1974 in 16 U.S.C. § 1381(d). (Gov't. Brief in Opp. 11, fn. 3.) On the contrary, the fact that Congress found it necessary to provide specific statutory authority for observer stationing during the first two years of the Act reflects an awareness that such stationing would otherwise be prohibited by the search and seizure provision of § 1377(d)(2), which was designed to be a permanent fixture of the Act.

4. The government invites the Court to "balance" the need to search against the invasion which the search entails (Gov't. Brief in Opp. 16), thus repeating the flawed analysis of the *en banc* majority. The Court has indeed employed such a balancing test in determining the reasonableness of a variety of "stop," or seizure of the person, procedures which (unlike a search) do not implicate the warrant clause of the Fourth Amendment. *See, e.g., Terry v. Ohio*, 392 U.S. 1, 16, 20 (1968) (stop and frisk); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 881 (1975) (roving patrol stops); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-8, 561 (1976) (fixed check-point stops); *Delaware v. Prouse*, 440 U.S. 648, 653-5 (1979) (random driver's license stops); *United States v. Villamonte-Marquez*, 51 U.S.L.W. 4812, 4814 (1983) (Custom's boarding of moored vessel in sea channel).

However, the reasonableness of a search under the Fourth Amendment does not admit of a simple balancing analysis. Rather, the initial inquiry is always whether there was a warrant or a recognized exception to the warrant clause. *Camara v. Municipal Court*, 387 U.S. 523, 528-9 (1967); *Coolidge v. New Hampshire*, 403 U.S. 443, 454-5 (1971); *United States v. United States District Court*, 407 U.S. 297, 315-18 (1972); *Delaware v. Prouse*, 440 U.S. 648, 654 fn. 11 (1979).

Exceptions to the warrant clause depend upon "whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." *Camara*, at 533; *Schmerber v. California*, 384 U.S. 757, 770-771 (1966).

As our Petition demonstrates (Pet. for Cert. 16-17), an essential requirement of the so-called pervasively regulated industry exception, upon which the government relies, is a determination that obtaining a warrant would frustrate inspection. The government, like the *en banc* majority,

totally ignores this requirement and focuses instead on the need to have observers aboard tuna vessels (as opposed to the necessity that their stationing be warrantless), and the alleged superiority of the agency's notice procedures to a warrant (Gov't. Brief in Opp. 16-18), factors which in and of themselves have never justified a warrantless search.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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